Filed 2/17/05 P. v. Lohner CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARTICE DETRESE LOHNER et al., Defendants and Appellants.	A100573 (Sonoma County Super. Ct. No. SCR-32175)

A jury convicted appellants Martice Detrese Lohner and Cardwell Joshua Thomas III of two counts each of first degree robbery in concert and second degree robbery, and of single counts of first degree residential burglary and attempted grand theft by trick. Lohner was also found to have committed simple assault. The jury also found Thomas guilty of two counts each of false imprisonment and misdemeanor unlawful use of a badge, as well as a single count of unlawful discharge of a firearm. The trial court found true an enhancement allegation that Thomas had been released on bail at the time of an offense. (See Pen. Code,[1] §§ 211, 213, subd. (a)(1)(A), 236, 240, 459, 538d, subd. (b)(2), 664, 12022.1; former § 487.[2]) Thomas was sentenced to 13 years in state prison for these offenses and a

[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] The version of this statute that applied at the time of the offense has subsequently been amended. (See Stats. 1993, ch. 1125, § 5, p. 6292; Stats. 2002,

prior conviction of unlawful discharge of a firearm; Lohner received a nine-year term. (See § 246.3.)

In his appeal, Thomas contends inter alia that (1) insufficient evidence supports one of his robbery convictions; (2) the trial court failed to instruct on the elements of unlawful use of a badge in violation of his constitutional rights to due process and jury trial, requiring reversal of two misdemeanor counts of this offense; and (3) giving CALJIC No. 17.41.1 was structural error requiring reversal.

For his part, Lohner contends that (4) there was insufficient evidence to support his convictions; (5) the trial court erroneously denied his request for pinpoint jury instructions; (6) prosecutorial misconduct occurred at trial; (7) the trial court erred in denying his motion for new trial on juror misconduct grounds; and (8) he should not have been given consecutive sentences for robbery and attempted theft. Thomas also joins in Lohner's arguments, to the extent that they are relevant to his convictions. We reverse Thomas's two misdemeanor convictions for using a false police badge, but otherwise affirm both judgments.

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ch. 787, § 12.) For purposes of this matter, the amended and earlier versions of the statute are substantially the same.

I. FACTS[3]

A. *Meyers Robbery*

Shortly after 9:00 p.m. on the evening of March 11, 2002,[4] 18-year-old Austin Meyers finished his shift as a delivery driver for a Petaluma pizzeria. Doug Burdick—an acquaintance of Meyers—rode up to the pizzeria in a dark Ford Bronco truck. Four other people were in the truck—two got out with Burdick and two remained inside.

Burdick pulled Meyers aside and asked for help buying some marijuana. Meyers agreed and went back to the truck to meet the two men who had gotten out of the truck. These two men were later identified as appellants Cardwell Joshua Thomas and Martice Detrese Lohner. Meyers, Burdick, Thomas and Lohner talked in a friendly manner for a while before Meyers went to a friend's house and bought some marijuana.

It took some time for Meyers to arrange the purchase and return with the marijuana. Meyers paid $165 for it, intending to sell it to Burdick for $170 or $175. Using his cell phone, he kept Burdick apprised of his progress and they arranged to meet at another pizzeria. They met at the appointed location between 10:45 p.m. and 11:00 p.m. Meyers had a friend with him and Burdick was still with his Bronco foursome. Thomas expressed concern that there were police officers in the area, so

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[3] The information originally charged codefendants Aubrey Kimble and Brianne Luna with most of the offenses that were charged against Thomas and Lohner. Before Luna testified at trial, Kimble pled no contest to nine charges and the trial court found him guilty of those offenses. Luna had earlier pled guilty to a single count of residential robbery of the Guidi home and obtained dismissal of all other charges against her in exchange for her testimony in this case and a grant of probation. The convictions of Kimble and Luna are not before us in this appeal. The facts set forth only mention these two defendants to the extent necessary to understand the legal issues posed by Thomas and Lohner.

[4] All subsequent dates refer to the 2002 calendar year unless otherwise indicated.

Meyers agreed to drive to another location. Meyers's friend got out of his car and Thomas and Lohner got in.

Meyers drove to a secluded residential neighborhood and tried to complete the sale. Thomas pulled out his wallet, announced that he was an undercover police officer, and flashed some kind of identification. He told Meyers that he was under arrest and ordered him to stop the car. Shocked, Meyers did so. At first, Meyers thought Thomas had shown him a real police badge, but soon he realized that he was being robbed instead of arrested. Thomas and Lohner both seemed too young to be real police officers.

Thomas and Lohner began shouting and cursing at Meyers, telling him how stupid he was. Meyers was frightened. Lohner took his wallet from him and emptied it of the cash—perhaps as much as $150. At Thomas's direction, Meyers got out of the car and emptied the contents of his pockets onto the hood of the car. The Bronco truck with two men inside pulled up along his car, making Meyers even more afraid. As Lohner stood with Meyers, Thomas searched his car, taking marijuana, about 100 CD's, a cell phone, a backpack and Meyers's keys. He also confirmed that Lohner had already gotten the cash from Meyers's wallet. They also took the contents of his pockets. Thomas and Lohner got into the Bronco and left.

B. *Jessica and Anthony Guidi Robbery, Burglary and False Imprisonment*

One day in early March, 14-year-old Jessica Guidi and her 16-year-old brother Anthony were staying with their father at his trailer home in Geyserville. Jessica had stayed home from school that day because she was sick. Someone knocked at the trailer door. She answered it, finding a man and a woman who were looking for someone she did not know. When she told them that the person they sought did not live there, they left. Jessica thought that they came in a black Bronco.

Jessica saw the man again about a week later when he knocked on the door of the trailer about the time the sun was starting to come up. It was another school day and her father had already left for work, but Anthony was there asleep. She answered the door. The visitors identified themselves as police and one of them—

later identified as Thomas—instructed Jessica to put her dogs behind a fence in back of the trailer. She did so.

Jessica believed that they really were police officers and that she had to comply with their instructions. She opened the door and three men—whom she later identified as Thomas, Lohner and a third man—came into the trailer home. Anthony came out to join her, having heard people talking inside the trailer. The three men said that they were police officers. Thomas very quickly flashed a badge. Thomas asked Jessica questions, telling her that if she did not cooperate with them, she would be arrested. They told Jessica that they were there for marijuana. She knew that her father sometimes smoked marijuana, but she had no idea that there was any in the trailer. One of them asked Anthony where the drug money was. He told them that he did not know. At some point, the third man left; Thomas and Lohner remained inside.

Jessica and Anthony went to their father's room to search for marijuana, but the door was locked. Jessica went to get the key, but Thomas kicked the door in before she came back from looking for it. Thomas pushed Anthony toward his father's bedroom. He instructed Jessica and Anthony to look for marijuana in their father's room. They searched, but did not find any marijuana or drug money. Thomas flipped the mattress on the bed up to see if there was anything under it and it fell onto Jessica. She thought this was an accident. About this time, Lohner took a bong from Anthony.

Thomas then told the Guidi children to wait in the bathroom after he made sure that there was no telephone in that room. Anthony and Jessica saw Thomas and Lohner placing some DVD's in Jessica's sleeping bag. She saw Lohner leaving the trailer while Thomas was still inside. By then, Jessica and Anthony realized that the men were not police officers.

Jessica was frightened of the strangers. She and her brother were both crying in the bathroom. She and Anthony remained there for about five minutes until they

heard a vehicle leave. Anthony noticed that his watch was also gone. The sleeping bag was still at the trailer, but a pillowcase was missing.

C. *Soto Robbery and Espinoza Assault and Attempted Theft*

Before dawn on March 14, Valentin Soto waited in the parking lot of the Egg Basket market in Fulton. He expected his employer to pick him up to do some roofing work. A woman—later identified as Brianne Luna—drove up in big Bronco truck. Three young men were with her in the truck—Thomas, Lohner, and Aubrey Kimble. Thomas leaned out the window of the truck and asked Soto if he was looking for work. Soto explained that he could not accept an offer, as he already had a job. Thomas continued chatting with Soto, offering to sell him some CD's from a plastic bag. Soto walked away and Thomas got out of the truck to follow him, offering to pay more than Soto's employer would pay.

Then, 17-year-old Virgilio Espinoza rode up on his bicycle. Soto asked Espinoza, an acquaintance, if he wanted to work for Thomas. Espinoza was leery at first; to him, the foursome from the truck looked untrustworthy. By this time, Lohner and Kimble had emerged from the truck and approached the others. Espinoza decided to work for Thomas, but Soto decided not to do so. Thomas asked Espinoza for some identification, so he could be assured that his new worker would not steal from the jobsite. Thomas also offered the two men a quick look at his identification when he showed them a police badge in his wallet.

Soto and Espinoza pulled out their wallets to show their identification. They were not certain whether Thomas was really a police officer. Soto did not want to offer his identification, but it seemed wiser to go along with the men. Espinoza returned his wallet to his pocket. Soto intended to hand over his identification, but not his wallet. Instead, he watched as a man whom he later identified as Lohner snatched his wallet. Soto also saw Thomas strike Espinoza. Espinoza tried to strike back, but someone—he could not see who—tried to grab him and then hit him once from behind. He fled, not realizing until later that he had been stabbed. Espinoza did not lose his wallet, but that was what he thought the men were after.

Soto had left Espinoza, purportedly to get help, but he soon returned. It seemed to him that the three men had run Espinoza off. The men got back into the truck and drove off. Espinoza came out of hiding and the two men tried to call 911, but abandoned their efforts, thinking it was too late to get their money back after the truck drove away.

D. *Investigation*

Law enforcement officials soon arrived at the Egg Basket market to investigate an aborted 911 call. Santa Rosa police received a bulletin about a black Bronco and spotted one that morning. Thomas was driving the truck that was pulled over by police. A woman sat in the front passenger seat and one man sat in the back seat Valentin Soto was driven to the place where the truck had been stopped. He identified Thomas as the man who spoke to him, pointed out Kimble as a perpetrator and told the sheriff that Luna had driven the Bronco. Virgilio Espinoza also viewed a photographic lineup and was able to identify Lohner as one of the men he encountered at the Egg Basket market.

Soto had identified the black Ford Bronco as the vehicle that he had described to police earlier. The sheriff impounded and searched the Bronco. A pillowcase full of DVD's, Kimble's wallet, a bong and .81 grams of cocaine base were found inside it, as were Meyers's backpack and wallet. No weapons were recovered, although Anthony had reported that all three men entering the trailer had been armed. Kimble was found to have $30 in cash on his person. Thomas had $201 in cash in his possession.

After the men left her father's trailer, Jessica had gone to a friend's house. She and Anthony telephoned their mother. Later that day, their parents called the police and Jessica spoke with a Sonoma County sheriff that afternoon. She viewed photographic lineups and identified Thomas and Lohner as the two men who stayed in the trailer the longest. Jessica also identified Luna as the woman who had spoken with her at the trailer two weeks before the robbery. Jessica was unable to identify anyone from the lineup containing Kimble's photograph. She told the sheriff that the

man who left the trailer very soon after he entered with the other two men was one that she could not identify.

The sheriff also showed Anthony a series of photographs and he identified Thomas and Kimble as two of the men who entered the trailer. He was positive about his identification of Thomas, but somewhat less certain of the identification of Kimble. He was unable to identify a photograph of Lohner. He also told police that he thought that Thomas had a handgun tucked into a pocket in the back of his pants. He never saw anyone draw or use a weapon.

For his part, Meyers had not reported his robbery to police because he feared getting in trouble for trying to buy marijuana for someone. After police asked him if he had lost a backpack, he admitted that it had been stolen. He made a report of the incident at that time, giving a false story that omitted any reference to the marijuana. Meyers viewed photographic lineups, positively identifying Thomas and Lohner as the men who took his backpack. Later, when prosecutors interviewed him, he told the truth about the marijuana purchase. Meyers was assured that he would not be prosecuted.

E. *Procedural History*

In April, Thomas and Lohner were both charged by information with two counts of first degree residential robbery, second degree robbery, and false imprisonment. They were also both charged with committing grand theft from the person, attempted second degree robbery, assault with a deadly weapon. Several of these offenses were alleged to have been serious felony offenses. Thomas was also charged with misdemeanor counts of fraudulent impersonation of a police officer and use of a false police badge. An enhancement was alleged that he had been released on bail at the time of the offenses. (See §§ 211, 236, 240, 246.3, 459, 538d, subds. (b)(1)-(2), 664, 12022.1; former § 487.)

In June, Thomas and Lohner moved to dismiss three robbery charges—the alleged robberies from Soto and the Guidi children—for insufficiency of evidence, without success. (See § 995.) The first amended information was filed that month

adding a bail enhancement to each of the nine felony counts alleged against Thomas. A second amended information was filed on July 1, making minor corrections to the existing charges and adding a prior conviction allegation alleged to constitute a strike, based on Thomas's January felony conviction for discharging a firearm in a grossly negligent manner in another matter in which sentencing was still pending.[5] (See § 246.3.)

Thomas's request for a bifurcated trial on the strike allegation and the bail enhancements was granted. He was also advised that if he testified, the People could impeach him with evidence of his prior conviction for discharging a firearm in a negligent manner. Lohner could be impeached by a prior petty theft conviction.

F. *Trial Evidence*

1. *Luna's Testimony*

At trial, Brianne Luna testified for the prosecution, after making an agreement that she would not be sentenced to prison. She told the jury that two weeks before March 14—when she was not yet 21 years old—she went to a mobilehome in Geyserville looking for someone named "Mike." Thomas and Lohner were with her. Luna had heard that this source might sell them up to a pound of marijuana at a time. Jessica Guidi had told her that no one named "Mike" lived there, so Luna left. She considered asking Jessica about the man who reportedly sold marijuana from the trailer, but she did not act on this impulse because the girl was young.

Sometime after midnight on March 14, Thomas—with whom she was then romantically involved—came in his Bronco truck to the Windsor house where she was staying. Thomas picked up Luna, Lohner and Kimble. The four of them tracked down some crack cocaine in Santa Rosa. Thomas and Luna offered up the cash to purchase it and all four of them smoked the cocaine. They were also drinking beer and malt liquor. In the early evening, Luna had also smoked marijuana.

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[5] The grand theft charge was modified slightly by the trial court, which told the jury to strike the reference to a statutory subdivision on its verdict form.

About 4:00 a.m., Luna drove the Bronco to the same Geyserville mobilehome that she had been to two weeks earlier. She and the three men planned to steal some marijuana from the Guidi home that they would then trade for more cocaine. The plan was for Luna to drive, but not to go into the house with the men. Thomas, Lohner and Kimble got out of the car, went to the mobilehome door and were soon gone from the porch. A short while later, Lohner returned to the car where Luna was waiting, saying that the man had left to get some cigarettes. His two young kids were the only ones at home, Lohner told Luna. Lohner waited in the car with Luna, leaving her briefly at one point to see whether Thomas and Kimble were still outside the trailer. A few minutes later, Thomas and Kimble returned to the truck. Kimble had a bong and two beers, while Thomas carried a pillowcase full of DVD's.

Luna drove off toward Santa Rosa. Thomas said that he hoped to be able to trade the DVD's for money or cocaine. Luna drove to the Egg Basket market, where they hoped to find Mexican workers waiting for work there who might have money they could steal. It was still dark out when they arrived. Luna left the motor running, positioning the car with the tail of the truck facing the market so she could pull out easily when it was time to leave. She was to be the getaway driver, but not to take the money herself. Thomas leaned out of the truck and asked a man—later identified as Valentin Soto—if he wanted to work helping him move. Soto declined, saying that he was already waiting for his boss. Thomas repeated his offer, saying it would only be two hours of work, but Soto declined again and walked away.

Thomas got out of the truck and continued speaking with Soto. After Thomas and Soto walked out of Luna's view, Lohner and Kimble got out of the truck. Thomas and Soto returned to Luna's sight with a third man on a bicycle—Virgilio Espinoza. Espinoza and Thomas began fighting, with Espinoza striking Thomas in the face. Lohner and Kimble joined in the scuffle and pushed Soto to keep him from intervening. Lohner also seemed to her to be trying to break up the fight. Luna told the jury that Lohner and Kimble did not actually strike Soto. Seeing Espinoza run off, she yelled at her friends to get in the truck.

The three men got in and Luna drove off. Thomas admitted that he had stabbed Espinoza. She saw the knife in the passenger compartment of the truck. She drove toward a crack house to get more cocaine, knowing that somehow someone in the truck had gotten some money. Lohner left the others before they arrived at the place where they were to purchase more cocaine. After Thomas got the cocaine, Luna put it in her bra and Thomas drove off. Luna saw at least two police cars while they were in transit. She was concerned that the police were looking for them after the incident at the Egg Basket. Acting on her own, she removed the cocaine from her bra, moved it to her underpants, and later put it in the back seat of the truck.

When the Bronco was pulled over, Thomas told Luna not to worry. He told her to give the police a false name for him. Luna gave police the name that Thomas asked her to use and told police that she did not know Thomas or Kimble very well. Luna had seen Thomas with a security officer's badge. It was found inside the passenger compartment of the truck when police pulled the vehicle over.

Luna was questioned by police about the Egg Basket incident. The police knew Thomas's true name by then. She told them what happened, leaving out any reference to Lohner's involvement in the fracas with Soto and Espinoza. They asked about the Guidi incident, too, and she took them to the Geyserville trailer. She was not present at the Meyers incident, she told the jury. Luna admitted that she had also been arrested for a misdemeanor theft for which she was diverted.

2. *Victims' Testimony*

The five alleged victims testified, recounting their experiences for the jury. For his part, Meyers testified that someone used his cell phone after it was taken from him. Some of those calls were made to Windsor. No one made any verbal threats to him, but he felt intimidated by the four people from the Bronco. If he did not give them what they wanted, he assumed he would be beaten up.

Soto testified that he was unafraid of the men who took his wallet, but was concerned for Espinoza after he was hit. He lost $480 in cash, his identification and some food stamps. In court, Soto identified Thomas, Lohner and Kimble as the three

men he met at the Egg Basket market. He told the jury that he was confident of his identification of Thomas and Lohner. He was certain that Thomas had shown him a badge and that Lohner was the man who had taken his wallet.

Espinoza also testified, telling the jury that he had first thought that he had been hit in the back but that later he realized that he had been stabbed in the back with a knife. The cut measured slightly less than a third of an inch. A doctor sewed up the cut and he returned to a hospital to have the stitches removed. No one tried to take his wallet, Espinoza testified. In court, Espinoza identified both Thomas and Lohner as two of the perpetrators—in person and from photographs. He also told the jury that he had identified Lohner from a photographic lineup conducted soon after the crime occurred.

In court, Anthony Guidi identified Thomas and Lohner in court as two of the three men who came into his father's trailer. Earlier, he had identified Thomas and Kimble from a photographic lineup. Anthony was unable to identify Lohner with any certainty in the photographic lineup, but he testified that he was confident about his in-court identification of Lohner. However, he was not sure whether the second man who remained in the trailer with Thomas was Kimble or Lohner. It was possible that Lohner was the man who left, but Anthony was not sure. Anthony's sister Jessica also identified two of the intruders as Thomas and Lohner.

3. *Defense Testimony*

Thomas and Lohner both moved for acquittal on all robbery counts, arguing that the evidence supported nothing more than theft and questioning the suggestiveness of the Espinoza lineup, without success. (See § 1118.1.) The trial court struck the great bodily injury enhancement and serious felony allegations relating to Thomas's alleged attempted robbery of Espinoza.[6] (See §§ 1192.7, subd. (c)(8), 12022.7, subd. (a).)

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[6] The serious felony allegation hinged on the commission of attempted robbery, the infliction of great bodily injury during the commission of the attempted robbery, or

Thomas chose not to take the stand, but Lohner testified in his own defense. The jury had already heard conflicting evidence about whether he or Kimble had remained with Thomas in the Guidi trailer. Luna had said that Lohner was with her and Kimble remained inside, but the Guidis believed that Lohner had been with Thomas and identified Kimble as the man who entered the trailer and left very soon afterward. Lohner told the jury that Kimble—who pled guilty to all charges against him in midtrial—was the second man at the Guidi trailer, not him.

Lohner also testified that the fight with Soto and Espinoza was underway before he got out of the truck. He broke up the fight between Thomas and Espinoza. He denied grabbing Espinoza's wallet, telling the jury that Kimble took it. He said that Soto was mistaken when he identified Lohner as the man who took Espinoza's wallet. He also denied stealing marijuana from Meyers.

When he learned that there was an arrest warrant out for him, Lohner turned himself in to police, telling them that he knew what had happened. He admitted at trial that he told police as little as possible and was as vague as he could be in order to protect himself.

G. *Verdict and Sentencing*

In July, the jury convicted Thomas and Lohner of two counts of first degree residential robbery in concert of Anthony and Jessica Guidi and two counts of second degree robbery of Meyers and Soto, and of a single count of first degree residential burglary of the Guidis. The jury found Thomas guilty of the false imprisonment of Anthony and Jessica Guidi and two counts of misdemeanor unlawful use of a badge.[7]

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the use of a deadly weapon during the commission of the offense. Ultimately, the jury acquitted both Thomas and Lohner of this felony charge, finding them guilty of the lesser included offense of attempted grand theft by trick. (See §§ 211, 487, 664.) Attempted grand theft is not a statutorily listed serious felony. (See § 1192.7, subd. (c).)

[7] On the People's motion, an allegation of a misdemeanor count of falsely impersonating a police officer was amended to allege a misdemeanor count of use of a false police badge. (See § 538d, subd. (b)(1)-(2).)

Lohner was acquitted of two counts of false imprisonment of Anthony and Jessica Guidi and both defendants were acquitted of a charge of grand theft from Soto's person. Thomas and Lohner were both acquitted of the attempted second degree robbery of Espinoza, but found guilty of lesser included offenses of attempted grand theft by trick from this victim. Lohner was also acquitted of assault with a deadly weapon against Espinoza, but found guilty of the lesser included offense of simple assault against him.

The jury was unable to reach a verdict on the charge that Thomas assaulted Espinoza with a deadly weapon. The trial court declared a mistrial on this charge and it was later dismissed after the People declined to refile the charge. Thomas opted for a court trial on the bail enhancement allegation and the prior strike allegation. In August, the trial court found true an enhancement allegation that Thomas had been released on bail at the time of an offense, but the allegation that his prior conviction constituted a strike was found not to have been proven. It concluded that Thomas suffered this prior conviction but that there was insufficient evidence that he personally used a firearm to warrant its use as a strike. In October, the People sought reconsideration of this ruling, which the trial court denied in December.

Lohner filed a motion for new trial on grounds of juror misconduct, court error, ineffective assistance of counsel and insufficiency of evidence. The trial court denied the motion for new trial in October. It found that Lohner's exculpatory testimony at trial had lacked credibility. Lohner was sentenced to a nine-year term in state prison—a principal midterm of six years for the first degree robbery in concert of Jessica Guidi; a concurrent six-year term for the first degree robbery in concert of Anthony Guidi; two consecutive terms of one year four months each for the second degree robberies of Soto and Meyers; and a consecutive four-month term for attempted grand theft by trick of Espinoza. Sentence for the first degree burglary of the Guidi residence was stayed on multiple punishment grounds.

In December, Thomas was sentenced to a total of 13 years in state prison—a principal midterm of six years for the first degree robbery in concert of Jessica Guidi;

a two-year consecutive term for the first degree robbery in concert of Anthony Guidi; two one-year consecutive terms for the second degree robberies of Soto and Meyers; a one-third consecutive term of four months for the attempted grand theft by trick of Espinoza, enhanced by a consecutive two-year term for commission of this offense while released on bail; and an eight-month consecutive term for the prior conviction for unlawful discharge of a firearm in an unrelated action.

II. SUFFICIENCY OF EVIDENCE

A. *Legal Standard*

First, Thomas and Lohner raise various challenges to the sufficiency of evidence supporting their convictions. Lohner contends that these insufficiencies constitute federal constitutional error. (See U.S. Const., 14th Amend.) The scope of appellate review of a challenge to the sufficiency of evidence is narrow. (*People v. Protopappas* (1988) 201 Cal.App.3d 152, 167.) When testing for sufficiency of evidence, we determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof on all elements of each offense. We must view the evidence in the light most favorable to the jury's verdict and must presume in support of those findings the existence of every fact that one could reasonably deduce from the evidence. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576 [enhancement].) We may not reweigh or reinterpret the evidence on appeal. (*People v. Pace* (1994) 27 Cal.App.4th 795, 798.)

We must determine whether substantial evidence supports the conclusion of the trier of fact, not whether evidence proves the disputed issue beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Crittenden* (1994) 9 Cal.4th 83, 139, cert. den. *sub nom. Crittenden v. California* (1995) 516 U.S. 849; *People v. Johnson, supra,* 26 Cal.3d at p. 576.) If sufficient evidence supports the trier of fact's finding, it is irrelevant that the evidence is also reasonably susceptible to a different finding. (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) Put another way, we may not set aside a finding for insufficiency of evidence unless it appears that under no hypothesis is there sufficient evidence to support it. (*People*

v. Bolin (1998) 18 Cal.4th 297, 331, cert. den. *sub nom. Bolin v. California* (1999) 526 U.S. 1006; *People v. Johnson* (1992) 5 Cal.App.4th 552, 561.) With this standard of review in mind, we turn to the specific challenges that Thomas and Lohner raise in their appeals.

B. *Soto Robbery*

Both Thomas and Lohner challenge the sufficiency of evidence supporting their convictions of second degree robbery of Valentin Soto.[8] (See U.S. Const., 14th Amend.) Both appellants were charged with and convicted of the second degree robbery of Soto. (See §§ 211, 212.5, subd. (c), 213, subd. (a)(2).) The crime of robbery is the felonious taking of personal property in the possession of another from his or her person or immediate presence, against his or her will, accomplished by means of force or fear. (§§ 7, 211.) If the element of taking by force or fear is not proven, then the defendant is guilty only of the lesser included offense of grand theft from the person. (See *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351; *People v. Church* (1897) 116 Cal. 300, 303-304; *People v. Brito* (1991) 232 Cal.App.3d 316, 325; see also § 487, subd. (c).) On appeal, Thomas and Lohner argue that there was insufficient evidence of force or fear for a reasonable jury to conclude that a robbery had occurred.

At trial, Soto testified that he declined Thomas's offer of work, but that Thomas persisted, to the point of getting out of his truck and pursuing Soto, who had walked away. When Thomas purported to be a police officer and demanded to see his identification, Soto did not want to comply. He thought it would be wiser to do so because it was possible that Thomas really was a police officer. When Soto removed his wallet from his pocket, Lohner snatched it. Later, Soto testified that he was not hit or threatened; that he took out his wallet in order to produce his

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[8] Lohner raised a sufficiency of evidence issue in his new trial motion, but his argument pertained only to the offenses relating to the incident at the Guidi trailer home. Thus, he did not challenge the sufficiency of evidence of the Soto robbery in the trial court on a motion for new trial.

identification after Thomas asserted his apparent authority; and that he was not afraid of them until after his wallet was taken. He became somewhat afraid for his friend only after Espinoza was struck, which happened immediately after Soto's wallet was taken.

On this evidence, Thomas and Lohner assert that there was no evidence of force or fear sufficient to establish this necessary element of robbery. Whether the element of force or fear was established is a question of fact for the jury to determine. (*People v. Church, supra,* 116 Cal. at pp. 302-303; *People v. Wright* (1996) 52 Cal.App.4th 203, 210, cert. den. *sub nom. Wright v. California* (1997) 522 U.S. 918; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707, 1709.) The terms "force" and "fear" have no technical meaning, but are presumed to be within the understanding of a jury based on its common sense. (*People v. Mungia, supra,* 234 Cal.App.3d at pp. 1708-1709; see *People v. Wright, supra,* 52 Cal.App.4th at p. 210.)

We are satisfied that the record establishes the element of fear for purposes of robbery. Soto's testimony that he was not afraid of the perpetrators before the actual taking of his wallet does not preclude a finding of fear for purposes of establishing robbery. The victim need not testify that he or she was afraid as long as there is some evidence from which a jury may infer that he or she was afraid and that this fear allowed the crime to be accomplished. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212; *People v. Mungia, supra,* 234 Cal.App.3d at p. 1709, fn. 2; see *People v. Renteria* (1964) 61 Cal.2d 497, 499.) Actual fear may be inferred from the circumstances surrounding the offense that are reasonably calculated to produce fear. (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698; *People v. Brew* (1991) 2 Cal.App.4th 99, 104.) In spite of a victim's bravado, the record may establish fear for purposes of robbery. (See, e.g., *People v. Renteria, supra,* 61 Cal.2d at p. 499 [armed robbery].)

Thomas and Lohner suggest that the fear Soto felt must have arisen by the time of the actual taking of his wallet. We disagree. Robbery is a continuing offense that is not complete until the perpetrator reaches a place of temporary safety. While

the robber is still in flight, he or she has not yet achieved a place of temporary safety. (*People v. Johnson, supra,* 5 Cal.App.4th at p. 559; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1160, cert. den. *sub nom. Barnett v. California* (1998) 525 U.S. 1044 ; *People v. Cooper* (1991) 53 Cal.3d 1158, 1169-1170 [aiding and abetting]; *People v. Flynn* (2000) 77 Cal.App.4th 766, 771-772; *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1375; *People v. Estes* (1983) 147 Cal.App.3d 23, 27.)

Whether a defendant has reached a place of temporary safety is a question of fact for the jury. (*People v. Johnson, supra,* 5 Cal.App.4th at p. 559.) When determining whether the defendant reached a place of temporary safety, we apply an objective standard—whether the defendant actually reached a place of temporary safety. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1292; *People v. Johnson, supra,* 5 Cal.App.4th at pp. 559-560.) The scene of a robbery itself cannot constitute a place of temporary safety, even if the victim flees that place, as Soto did. (See *People v. Haynes, supra,* 61 Cal.App.4th at p. 1292; *People v. Ramirez, supra,* 39 Cal.App.4th at p. 1375.)

As robbery is a continuing offense, California courts have long held that the force or fear element of the offense may be achieved at any time before the robbery is complete. A mere theft may become a robbery if the perpetrator, having gained possession of the property in a peaceful manner such as by pretext, then uses force or fear in order to retain the res or to carry it away. Thus, the use of force or fear is sufficient if it occurs either at the moment of the taking *or* during the period of carrying the res away to a place of temporary safety. (*People v. Hill* (1998) 17 Cal.4th 800, 850 (*Hill*); *People v. Cooper, supra,* 53 Cal.3d at p. 1165 fn. 8.) Thomas and Lohner protest that this statement of the California Supreme Court in *Cooper* is dicta, but the principle cited is long established in our state's jurisprudence and has been cited by our state's high court since *Cooper* was decided. (See, e.g., *Hill, supra,* 17 Cal.4th at p. 850; *People v. Anderson* (1966) 64 Cal.2d 633, 638; *People v. Flynn, supra,* 77 Cal.App.4th at pp. 771-772; *People v. Torres* (1996) 43 Cal.App.4th 1073, 1079, disapproved on other grounds in *People v. Mosby* (2004) 33

Cal.4th 353, 365 fn. 3; *People v. Kent* (1981) 125 Cal.App.3d 207, 213-214, fn. 6; see also *People v. Estes, supra,* 147 Cal.App.3d at pp. 27-28.) The evidence is sufficient to establish force or fear if a perpetrator—having obtained the property by ruse—uses force or fear to prevent a victim from retaking the res or to facilitate his or her escape with the victim's property. (*People v. Estes, supra,* 147 Cal.App.3d at pp. 27-28.)

In the case at bar, Soto fled the immediate vicinity of the taking as soon as his wallet was taken and his companion Espinoza became involved in a fight with Thomas. The perpetrators had not then fled the scene themselves. Although Soto testified that he was "not very" afraid of Thomas, Lohner and Kimble, the size of the three perpetrators,[9] the fact that they outnumbered him and Espinoza, the early hour of the day before dawn, the relative isolation that these day workers likely felt in the location where the offenses were committed, and the fact that Soto fled the immediate vicinity when Espinoza began taking blows are all circumstances on which a rational trier of fact could find that Soto was afraid. That the evidence may be consistent with other possible interpretations is irrelevant as long as there was sufficient evidence to support a rational trier of fact's finding of robbery. (*Hill, supra,* 17 Cal.4th at p. 850.) We are satisfied that there was substantial evidence for a reasonable jury to conclude that the force or fear element of robbery was established at trial.

Assuming arguendo that this evidence was not sufficient, there is also evidence that Soto was afraid for Espinoza once he and Thomas began fighting. Fear of immediate injury to anyone in the company of a robbery victim is sufficient to establish fear for purposes of robbery. (*People v. Prieto* (1993) 15 Cal.App.4th 210, 213; see § 212, subd. 2.) Thomas argues that there is no evidence that the fight

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[9] Thomas was about 6'1" tall and 180 pounds. Lohner was about 5'9" tall and weighed about 230 pounds. Kimble was about 5'10" tall weighing about 170 to 180 pounds.

between Espinoza and Thomas occurred because Espinoza was trying to regain Soto's property. It is not necessary to find that Espinoza fought Thomas in order to retrieve Soto's wallet. In this matter, the short lapse of time between Soto's loss of his wallet and the Espinoza-Thomas fight allowed the jury to infer that Espinoza was being beaten to prevent him from trying to reclaim Soto's wallet or to discourage either man from interfering with the perpetrators as they prepared to flee. As there was evidence that might persuade a reasonable jury that Soto was afraid—either for himself or for Espinoza—we find sufficient evidence to support a finding of fear. (*People v. Bolin, supra,* 18 Cal.4th at p. 331; *People v. Johnson, supra,* 5 Cal.App.4th at p. 561; see *People v. Haynes, supra,* 61 Cal.App.4th at p. 1292; *People v. Ramirez, supra,* 39 Cal.App.4th at p. 1375.) Thus, sufficient evidence supports the jury's conviction of Thomas and Lohner for the second degree robbery of Soto.

C. *Jessica Guidi Robbery*

1. *Possession*

Lohner also contends that there is insufficient evidence of taking of property in Jessica Guidi's possession and of taking by force or fear to support his conviction of robbing her.[10] Thomas joins in this claim of error. (See U.S. Const., 14th Amend.; see also § 211) Both Thomas and Lohner were convicted of first degree residential robbery of Jessica Guidi.

First, Thomas and Lohner argue that Jessica did not have actual or constructive possession of any of the property that was taken from the Geyserville trailer. The property taken actually belonged to her brother and her father and as Jessica resided with her mother, she was a person that the appellants characterize as a

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[10] Lohner challenged his convictions related to the Guidi robbery in his motion for new trial, but his objections focused on the offenses found to have been committed against Anthony Guidi or on his testimony that he was not present in the trailer during the robbery by Thomas and Kimble. Thus, this aspect of Lohner's sufficiency of evidence claim of error was not raised in the trial court.

guest in her father's trailer. Thomas and Lohner reason that no robbery of Jessica occurred because she was merely a visitor at the trailer and she had no possessory interest in the stolen goods. They argue that they were guilty of nothing more than burglary—not robbery.

Case law does not support this reasoning. To constitute robbery, property must be taken from the victim's *possession*. (§ 211; *People v. Nguyen* (2000) 24 Cal.4th 756, 761-762.) Thomas and Lohner assert that the property taken belonged to Anthony and his father. This assertion turns on ownership, not possession. It is not a defense to robbery that the victim was not the true *owner* of the property taken. (*People v. Moore* (1970) 4 Cal.App.3d 668, 670; see *Sykes v. Superior Court* (1994) 30 Cal.App.4th 479, 482.)

Thomas and Lohner also assert that Jessica did not *possess* the property taken such that she could constitute a robbery victim. Possession for purposes of robbery may be actual or constructive. (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1111; see *People v. Miller* (1977) 18 Cal.3d 873, 880-881, overruled on other grounds in *People v. Oates* (2004) 32 Cal.4th 1048, 1067-1068 fn. 8; see also *People v. Nguyen, supra,* 24 Cal.4th at p. 764.) Even a thief may possess property sufficient that he or she may be a victim of robbery. (*People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143.) One who acts as a representative of the property owner has constructive possession of that property for purposes of robbery. (See *People v. Jones* (1996) 42 Cal.App.4th 1047, 1054.) Constructive possession turns on a special relationship between the owner of the property and the alleged robbery victim. (*People v. Galoia* (1994) 31 Cal.App.4th 595, 599; *Sykes v. Superior Court, supra,* 30 Cal.App.4th at p. 484.) A family member may be entrusted with the protection and preservation of property belonging to an absent resident of the home. In such circumstances, the family member possesses the property of the absent resident such that the family member has constructive possession of the property for purposes of robbery. (*Sykes v. Superior Court, supra,* 30 Cal.App.4th at p. 482; see *People v. Gordon* (1982) 136 Cal.App.3d 519, 529.)

Jessica told the jury that she sometimes visited her father and stayed at his trailer, where she had her own room. It was her home, she agreed. Her father was not home at the time that the three men entered the trailer on the pretext that they were police officers. She also identified some of the DVD's taken as belonging to her or her family.

This testimony offers at least two possible bases for finding that Jessica had possession of the property taken from the trailer. She may have had possession of all the items in the trailer because the trailer was her home. She had her own bedroom there. Thomas and Lohner cite no cases—and we have found none in our own research—in support of their apparent claim that her father's possible status as a noncustodial parent would preclude a finding that Jessica had a home with him. As the trailer appears to have been her home as much as the home she shared with her mother, we conclude that Jessica had sufficient possession of the personal property contained within it to be a robbery victim.

Even assuming arguendo that the trailer was not Jessica's home, she still had constructive possession of it and its contents. She testified that her father was not at home at the time that the three men entered the trailer. From this evidence, the jury could infer that Jessica had constructive possession of his property left there. Thus, we are satisfied that Jessica had a sufficient interest in the DVD's taken from her or her family that she constructively possessed them for purposes of robbery. (See *People v. Galoia, supra,* 31 Cal.App.4th at p. 598.)

2. *Force or Fear*

Thomas and Lohner also argue that the evidence of robbery of Jessica was also insufficient because the property was acquired by trick rather than by the use of force or fear. Jessica testified that no one used force against her. On the issue of fear, she told the jury that she was frightened, but that she initially cooperated with the intruders because she believed that they were police officers. Thus, Thomas and Lohner reason, there is no evidence of force or fear sufficient to establish this necessary element of robbery.

To constitute robbery, property must be taken from a victim by force or fear. (§ 211.) If there was no taking by force or fear, then the crime committed is the lesser offense of grand theft from the person. (See *People v. Ramkeesoon, supra,* 39 Cal.3d at p. 351; *People v. Church, supra,* 116 Cal. at pp. 303-304; *People v. Brito, supra,* 232 Cal.App.3d at p. 325; see also § 487, subd. (c).) Thomas and Lohner assert that there was insufficient evidence that the property was taken from Jessica by force or fear.

Again, we find that Thomas and Lohner are incorrect, both in their interpretation of the facts on this issue and on the relevant case law. At trial, Jessica testified that from the time that the men came to her door, she was afraid of them. They did not hit or threaten her with force, either before or after she decided that they were not really police officers. She did what they asked because she thought she had to do so—she believed that she was obeying an order from a police officer. Even so, she was still frightened. Once she decided that they were not really police officers, she still did not feel that she could leave the bathroom. Thus, Jessica testified that she *was* afraid of the men—in the early stages of the crime, because she thought that they were police officers and in the last minutes, because she knew that they were not but felt that she could not emerge from the bathroom to take back the property they were in the process of stealing.

Fear for purposes of robbery is established if the victim complies with an unlawful demand for his or her property. (*People v. Davison, supra,* 32 Cal.App.4th at p. 212.) Gaining possession of property by frightening a victim such that he or she is deterred from taking steps to prevent the theft is sufficient to establish fear for purposes of robbery. (See *People v. Flynn, supra,* 77 Cal.App.4th at pp. 771.) A mere theft may become a robbery if the perpetrator, having gained possession of the property in a peaceful manner—such as by pretext or ruse—uses fear to prevent a victim from reclaiming the property or uses fear as a means of retaining the property in order to carry it away. (See *Hill, supra,* 17 Cal.4th at p. 850; *People v. Cooper, supra,* 53 Cal.3d at p. 1165 fn. 8; *People v. Estes, supra,* 147 Cal.App.3d at pp. 27-

28.) It does not matter whether Jessica feared these men because she believed they were police officers or whether she believed that they were criminals. She was afraid of them. We are satisfied that there was sufficient evidence of Jessica's fear to support the finding of first degree residential robbery against both Thomas and Lohner.

D. *Anthony Guidi Robbery*

Lohner also contends that there is insufficient evidence of taking by force or fear from Anthony Guidi or that property was taken from his immediate presence to support his conviction of robbing him.[11] Thomas joins in this claim of error. (See U.S. Const., 14th Amend.; see also § 211.) Both Thomas and Lohner were convicted of first degree residential robbery of Anthony Guidi.

On appeal, Thomas and Lohner first argue that because Anthony was tricked into compliance, there was no force or fear sufficient to support a finding of robbery. This reasoning is precisely the same as that which we have already rejected in the failed challenge to the robbery of Anthony's sister Jessica. (See pt. II.C.2., *ante*.) For the same reasons that we cited in rejecting that challenge, we also reject their challenge to the jury's implied finding of the necessary element of force or fear in the robbery of Anthony Guidi. (See *Hill, supra,* 17 Cal.4th at p. 850; *People v. Cooper, supra,* 53 Cal.3d at p. 1165 fn. 8; *People v. Davison, supra,* 32 Cal.App.4th at p. 212; see also *People v. Flynn, supra,* 77 Cal.App.4th at pp. 771; *People v. Estes, supra,* 147 Cal.App.3d at pp. 27-28.)

At trial, Anthony testified that he was not pushed or hit by the intruders. However, he also testified that the "situation" was "scary" "[r]ight from the start." He was frightened at first because he believed that the intruders were police officers. After he decided that they were not representatives of law enforcement, Anthony

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[11] In the trial court, Lohner argued in his motion for new trial that this conviction was improper because—according to his testimony—he was not one of the two men who remained in the trailer and thus did not actually take property from the Guidis. The trial court found Lohner's testimony to lack credibility and denied the new trial motion.

thought it was wiser—for himself and his younger sister—to comply with their demands. Jessica testified that during this time—when the two of them were in the bathroom and knew that the men were not police officers—Anthony was crying. This evidence is sufficient to allow a rational jury to conclude that Anthony was afraid of Thomas and Lohner for purposes of robbery. (See § 211; *Hill, supra,* 17 Cal.4th at p. 850.)

Thomas and Lohner also urge us to conclude that there is insufficient evidence that any property was taken from Anthony's immediate presence. For purposes of robbery, a taking must be from the immediate presence of the victim. (See § 211.) A taking may be accomplished by means of force or fear but may still not be from the immediate presence of the victim. (*People v. Hayes* (1990) 52 Cal.3d 577, 627, cert. den. *sub nom. Hayes v. California* (1991) 502 U.S 958.) Property is deemed to be in the immediate presence of a person if the res is so within his or her reach, inspection, observation or control that he or she could, if not overcome by violence or prevented by fear, retain his or her possession of it. (*People v. Webster* (1991) 54 Cal.3d 411, 440, cert. den. *sub nom. Webster v. California* (1992) 503 U.S.1009; *People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1347-1348.) The zone of immediate presence includes the area within which the victim could reasonably be expected to exercise some physical control over his or her property. (*People v. Webster, supra,* 54 Cal.3d at p. 440.)

At trial, Anthony testified that the men directed him to go into his bedroom. When Lohner asked him whether he had any drug paraphernalia, he reported that he had a bong. Then, Anthony told the jury "he grabbed that." This testimony was evidence from which a jury could conclude that the bong was taken from Anthony's immediate presence while in his bedroom.[12] (See *People v. Webster, supra,* 54 Cal.3d at p. 440; *People v. Dominguez, supra,* 11 Cal.App.4th at pp. 1347-1348.) As

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[12] In light of this conclusion, we need not consider whether Anthony's watch or family DVD's were taken from Anthony's immediate presence.

the immediate presence element was established, there was substantial evidence to support the jury's finding that Thomas and Lohner were guilty of the first degree residential robbery of Anthony Guidi.

E. *Meyers Robbery*

Lohner next challenges the sufficiency of evidence of the element of force or fear to support his conviction of robbing Austin Meyers.[13] Thomas joins in this claim of error. (See U.S. Const., 14th Amend.; see also § 211.) The jury convicted both Thomas and Lohner of the second degree robbery of Austin Meyers. Again, this argument is based on reasoning that we have already rejected. If a victim is so frightened that he or she is deterred from taking steps to reclaim property taken from him or her in a peaceful manner or uses fear as a means of retaining the property in order to carry it away, then the victim experienced sufficient fear to establish this necessary element of the crime of robbery. (See *Hill, supra,* 17 Cal.4th at p. 850; *People v. Cooper, supra,* 53 Cal.3d at p. 1165 fn. 8; *People v. Estes, supra,* 147 Cal.App.3d at pp. 27-28.)

Meyers testified that he was afraid, despite the fact that no verbal threats were made and no force was used to take his property. They were four people and he was one. He felt an implied physical threat and did not believe that he could have stopped the looting of his vehicle. The situation was scary and he felt intimidated by Thomas and his companions. He was afraid that he would be beaten if he resisted them. Thus, we find sufficient evidence to support the jury's implied finding of force or fear.[14] (See *Hill, supra,* 17 Cal.4th at p. 850; *People v. Cooper, supra,* 53 Cal.3d at p. 1165 fn. 8; *People v. Estes, supra,* 147 Cal.App.3d at pp. 27-28.)

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[13] In the trial court, Lohner moved for a new trial on this ground. The trial court denied the motion, finding that Lohner's testimony was not credible.

[14] In light of this conclusion, we need not consider whether Lohner's taking of Meyers's wallet was accomplished by means of force or fear.

In a separate challenge, Lohner also discounts his behavior, suggesting that he did nothing more than be present while Thomas robbed Meyers.[15] However, Meyers's testimony allowed the jury to make different inferences about Lohner's conduct. Meyers testified that Lohner stood beside him while Thomas committed the robbery. He believed that Lohner stood there to make certain that nothing happened to Thomas while the robbery was in progress. Meyers told the jury that he did not feel like he could defend his property while Lohner and two others sitting in the Bronco were nearby. Thus, there was evidence from which the jury could conclude that Lohner was not a mere onlooker or bystander. Regardless of whether he committed an overt act during the robbery, there was evidence offered at trial suggesting that his presence encouraged Thomas and acted as a deterrent to any resistance from Meyers. This was sufficient to allow a jury to infer that Lohner intended to participate in Thomas's robbery, making him guilty of that offense as an aider and abettor. (See, e.g., *People v. Moore* (1953) 120 Cal.App.2d 303, 306, cert. den. *sub nom. Moore v. Heinze* (1954) 347 U.S. 978; see also *People v. Phan* (1993) 14 Cal.App.4th 1453, 1463-1464.)

F. *Espinoza Attempted Grand Theft and Assault*

1. *Background*

Next, Lohner argues that there is insufficient evidence to support his conviction of offenses allegedly committed against Virgilio Espinoza. (See U.S. Const., 14th Amend; see §§ 487, 664.) Thomas joins in this issue, to the extent that it is relevant to his defense. The information alleged that Thomas and Lohner had committed two offenses against Espinoza—attempted second degree robbery and assault with a deadly weapon. (See §§ 211, 245, subd. (a)(1), 664.) The jury acquitted Thomas and Lohner of attempted robbery, but found both guilty of the

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[15] Lohner alluded to his view of conduct when arguing for his motion for new trial, which the trial court denied.

lesser included offense of attempted grand theft by trick.[16] (See §§ 487, 664.) The jury also acquitted Lohner of assault with a deadly weapon, but found him guilty of simple assault, a misdemeanor. (§§ 17, subd. (a), 240, 241, subd. (a).) It was unable to reach a verdict on the assault with a deadly weapon offense with respect to Thomas and the trial court granted a mistrial on this charge against Thomas.

2. *Taking*

Thomas and Lohner contend that there is insufficient evidence that they attempted to steal from Espinoza to support their convictions of attempted grand theft by trick. They reason that because Espinoza testified that no one tried to take his wallet, the case for attempted grand theft by trick was too weak to withstand a sufficiency of evidence challenge. We disagree, for both factual and legal reasons.

On the facts, Thomas and Lohner focus almost exclusively on a single aspect of Espinoza's testimony. Espinoza told the jury that the men who approached him did not try to take his wallet. While this evidence is obviously relevant to the issue before us, it is not the sum total of all the evidence bearing on the issue of whether they committed attempted grand theft by trick. When determining the sufficiency of evidence, we must review the *entire record* in the light most favorable to the jury's verdict. (See, e.g., *People v. Navarette* (2003) 30 Cal.4th 458, 498, cert. den. *sub nom. Navarette v. California* (Jan. 20, 2004) ___ U.S. ___ [124 S.Ct. 1149].)

The jury also heard evidence tending to support a finding that Thomas and Lohner intended to commit grand theft by trick and that they committed overt acts in furtherance of that goal. At trial, Espinoza also testified that someone *did* try to grab his wallet. He specifically told the jury that he thought that the men were trying to take his wallet. He believed that they hit him because they wanted to take his wallet. In context, the jury may have concluded that what Espinoza meant by the totality of

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[16] The argument in Lohner's reply brief is premised on the assumption that he was convicted of attempted robbery. In fact, he was acquitted of this charge and convicted of only the lesser included offense of attempted grand theft by trick.

his testimony was that while no one made a grab for his wallet, they wanted to and were trying to take it.

There was other evidence tending to show an overt act[17] sufficient to establish an attempt to commit grand theft by trick. Thomas committed the overt act of flashing a fake police badge at Soto and Espinoza. Someone actually took Soto's wallet. Thomas struck Espinoza. Someone stabbed Espinoza, too, and while it is not clear who was the perpetrator, the evidence at trial allowed a reasonable jury to conclude that the men with the assailant were aiding and abetting him.

There was also evidence of an intent to commit grand theft by trick.[18] Luna testified that she and the three men went to the Egg Basket market to find someone from whom to steal money to buy drugs. While she did not testify that this was the goal of all four of them, she testified that earlier in the evening, they went to the trailer at Geyserville with the common goal of stealing marijuana to trade for cocaine. After they failed to obtain much that they could trade for cocaine in Geyserville, they headed toward the Egg Basket market. From this evidence, the jury could reasonably infer that Thomas and Lohner formed the specific intent to steal before approaching Espinoza. (See *People v. Navarette, supra,* 30 Cal.4th at p. 499 [inferences permissible].) The jury could also have reasonably inferred that Thomas's use of a fake police badge was intended to trick Espinoza into opening his wallet such that Thomas or one of his cohorts could steal the money contained within

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[17] The evidence of overt acts focuses most strongly on the acts undertaken by Thomas. However, the evidence may raise a reasonable inference that Lohner also committed overt acts such as approaching Espinoza and Soto, perhaps restraining Espinoza while Thomas struck him, either restraining Espinoza or actually inflicting the stab wound that this victim suffered. Even if Lohner did not commit one of these acts himself, he could be guilty of this attempted crime as an aider and abettor. (See pt. II.G., *post*.)

[18] Lohner also asserts in his reply brief that he lacked the necessary specific intent to commit this offense.

it. (See *Hill, supra,* 17 Cal.4th at pp. 851-852 [jury can infer defendant's mental state from circumstances surrounding offense].)

From all of this evidence, a reasonable jury could have concluded that Thomas and Lohner had the intent to steal Espinoza's wallet and that overt acts were committed in an attempt to facilitate this taking. This evidence was sufficient to allow a jury to conclude that while the men did not achieve their goal of taking Espinoza's wallet, they attempted to do so. Thus, the facts shown by the record on appeal are more than the limited references that Thomas and Lohner would have us consider.

Second, their argument on appeal is wrong on the law. Thomas and Lohner imply that if no one actually made a move to take Espinoza's wallet, no crimes of attempted grand theft by trick occurred. We disagree. The law does not require the evidence to show that the last act of an attempted theft was committed in order to offer substantial evidence of an attempt to commit grand theft by trick. An attempt requires a specific intent to commit the underlying offense, as well as a direct but ineffectual act done toward its commission. The act must go beyond mere preparation and must show that the perpetrator is putting the plan into action. However, the act need not be the last act necessary to accomplish the commission of the substantive offense. (*People v. Kipp* (1998) 18 Cal.4th 349, 376, cert. den. *sub nom. Kipp v. California* (1999) 525 U.S. 1152; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862.) One may be convicted of an attempted theft offense even if the thief flees before committing the overt act of actually taking property. (See *People v. Navarette, supra,* 30 Cal.4th at p. 499 [attempted robbery]; *People v. Vizcarra, supra,* 110 Cal.App.3d at pp. 861-863 [attempted robbery].) The facts of each case guide us in making this assessment. (See *People v. Vizcarra, supra,* 110 Cal.App.3d at p. 863.)

In this case, there was substantial evidence of overt acts—flashing the badge, demanding to see the victims' identification, taking Soto's wallet, and hitting Espinoza—and an intent to commit grand theft by trick sufficient to prove an attempt

to commit that offense. When—as here—the intended victim puts up a fight preventing the defendants from accomplishing their objective of theft, the jury may nevertheless conclude from the evidence presented at trial that the defendants attempted to commit a theft offense. (See *People v. Henderson* (1967) 255 Cal.App.2d 513, 517.) We may rely on inferences that the jury may have reasonably deduced from direct evidence. (See *Hill, supra,* 17 Cal.4th at pp. 851-852 [jury can infer defendant's mental state from circumstances surrounding offense]; *People v. Vizcarra, supra,* 110 Cal.App.3d at p. 863.) That the evidence might also be consistent with other possible interpretations of the evidence is irrelevant, as long as there was substantial evidence from which a rational trier of fact could conclude that Thomas and Lohner attempted to commit grand theft by trick. (See *Hill, supra,* 17 Cal.4th at p. 850.)

We apply the correct law and all the facts known to the jury to determine whether substantial evidence supports the jury's verdict on attempted grand theft by trick. As such, we find that there was substantial evidence to support the jury's finding that Thomas and Lohner both attempted to commit grand theft by attempting to trick Espinoza into handing over his wallet.

3. *Identification*

Next, Thomas and Lohner argue that after Espinoza repeatedly failed to identify them in court, they were ordered to comply with a suggestive, in-court showup procedure. They reason that this evidence should not have been admitted and that, without it, there was no admissible evidence linking them to the Espinoza attempted grand theft by trick. For his part, Lohner also asserts that this error taints his conviction for misdemeanor assault. (See §§ 17, subd. (a), 240, 241, subd. (a).)

In the trial court, Espinoza was questioned about the identity of the men who assaulted him. He told the jury that he did not see them in court, but he described them by gender, race, height, build and hairstyle. The prosecution then asked the defendants to stand for Espinoza. Thomas objected on relevance grounds; Kimble's counsel argued that the procedure would be unduly suggestive. The trial court

overruled these objections and instructed Thomas, Lohner and Kimble to stand up in order to allow Espinoza to make an in-court identification. Espinoza then identified Thomas and Lohner. He also examined photographs and was able to identify Thomas and Lohner from them. In his motion for new trial, Lohner argued that the in-court identification procedure violated his due process rights and his privilege against self-incrimination, without success. (See U.S. Const., 5th & 14th Amends.)

The Fifth Amendment privilege against self-incrimination protects an accused from being compelled to testify against himself or herself or otherwise provide the state with evidence of a testimonial or communicative nature. (*Schmerber v. California* (1966) 384 U.S. 757, 760.) Thus, a defendant does not have a constitutional right to refuse to participate in a physical exhibition of his or her body. Such physical identifications—even those conducted in court—do not involve a testimonial communication protected by the privilege against self-incrimination. (*People v. Turner* (1971) 22 Cal.App.3d 174, 180-182 [defendant properly compelled to model scarf and sunglasses similar to those worn by photographed forger]; see *Schmerber v. California, supra,* 384 U.S. at pp. 760-765.) A defendant may be compelled "to stand, to assume a stance, to walk, or to make a particular gesture" without violating the privilege against self-incrimination. (*Id.* at p. 764.) In this matter, the procedure used in court to offer another opportunity for identification did not violate Thomas or Lohner's privilege against self-incrimination.

Even if no privilege against self-incrimination were violated, identification procedures may violate due process if, when judged on the basis of the totality of the circumstances, they are unnecessarily suggestive and conducive to mistaken identification. (*Foster v. California* (1969) 394 U.S. 440, 442.) However, the identification procedures used in court were not unnecessarily suggestive. Espinoza made repeated references to the height and girth of the men who confronted him. The attempt to refer to the three men by description alone was becoming confusing. By asking the three defendants to stand, both Espinoza and the jury were allowed to see their relative heights and sizes. Espinoza was able to make a second

identification of Lohner, whom he had already identified from a photographic lineup soon after the crime occurred—and an initial identification of Thomas. In court, Espinoza was also shown three photographs of Thomas, Lohner and Kimble and he was able to identifty Thomas and Lohner from them. In this manner, the jury was able to measure Espinoza's descriptions against the defendants' appearance. We conclude that the identification procedure used in this matter did not violate the due process rights of Thomas or Lohner.

G. *Guidi Incident*

In his final challenge to the sufficiency of evidence, Lohner contends that there is insufficient evidence of his participation at the Guidi trailer to support his convictions for burglary and robbery stemming from the incident in Geyserville. (See U.S. Const., 14th Amend.) The jury convicted Lohner of two counts of first degree residential robbery in concert and one count of residential burglary related to the incident at the Guidi trailer in Geyserville. (See §§ 211, 213, subd. (a)(1)(A), 459.) He was acquitted of two counts of false imprisonment, while Thomas was convicted of those two charges. He raised a similar challenge in his motion for new trial, which turned on evidence suggesting that Kimble—not Lohner—was the second man who assisted Thomas in robbing the Guidi children and burglarizing their home. The trial court denied the motion for new trial, later specifically stating that Lohner's trial testimony was not credible. At sentencing, the trial court concluded that Lohner was present in Geyserville and had gone there with the others with the intention of engaging in criminal activity. It found that he would be liable for the acts committed whether or not he later "distance[d]" himself from his cohorts.[19]

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[19] We do not accept Lohner's characterization of the sentencing court's comments as a finding that he was the third man who left Thomas and Kimble soon after the three of them entered the Guidi trailer. However, that court did acknowledge the lesser role that Lohner had when compared with Thomas when it imposed a lesser sentence than that which Thomas was given.

On appeal, Lohner argues that, as a matter of law, he cannot be held criminally liable for aiding and abetting the burglary and robberies in Geyserville. We need not consider the law of aiding and abetting as it relates to burglary, as there was sufficient evidence that Lohner was guilty of that offense without resort to any aiding or abetting theory. A burglary is complete once a defendant enters a statutorily enumerated structure with the intent to commit a felony or theft within, regardless of whether any felony or theft is actually committed afterward. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042; *People v. Brownlee* (1977) 74 Cal.App.3d 921, 930; see § 459.) Luna's testimony was that all four of the cohorts—including Lohner—drove to Geyserville with the intent to steal marijuana from the trailer and use it to obtain cocaine. Lohner himself testified that he entered the trailer, staying a few minutes before he left. Thus, we reject Lohner's challenge to the sufficiency of evidence in support of his burglary conviction.

As to the two robbery convictions, even if we assume arguendo that Lohner left the trailer before Thomas and Kimble completed the robberies within it—that he was the "third man" who did not actually commit the robberies—there is substantial evidence to find Lohner guilty of those two counts as an aider and abettor.[20] All persons who aid and abet the commission of a crime are criminally liable as principals. (§ 31; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529.) One aids and abets the commission of a crime when one, by act or advice, aids, promotes, encourages or instigates the commission of that crime with knowledge of the perpetrator's unlawful purpose and with the intent or purpose of committing, facilitating or encouraging the commission of the crime. (*Hill, supra,* 17 Cal.4th at p. 851; see *People v. Henderson, supra,* 255 Cal.App.2d at p. 517 [aiding and abetting defendant guilty as principal].) An aider and abettor forms the intent to encourage or facilitate a perpetrator's actions before or during commission of the

[20] The jury specifically found that Lohner committed these two offenses in concert with Thomas, Kimble and Luna.

offense. (*People v. Cooper, supra,* 53 Cal.3d at p. 1164; *People v. Joiner* (2000) 84 Cal.App.4th 946, 967.)

The record on appeal contains substantial evidence from which a jury could conclude that Lohner had the requisite intent to commit robbery within the trailer. Luna testified that Lohner went to Geyserville intending to steal marijuana from the trailer and use it to obtain cocaine. Lohner disputes this evidence of a prior intent, reasoning that the record is "more consistent" with his claim that he entered the trailer without a criminal purpose and left when he discovered what Thomas intended to do. In this manner, he attempts to persuade us to substitute his view of the evidence for that apparently taken by the jury. We have no power to do so when we review a record for substantial evidence. (See *People v. Bolin, supra,* 18 Cal.4th at p. 331; *People v. Escobar, supra,* 3 Cal.4th at p. 750; *People v. Johnson, supra,* 5 Cal.App.4th at p. 561.)

Lohner argues that he was merely present at the scene of the crime—that to hold him liable for Thomas and Kimble's acts would constitute guilt by association. The record on appeal suggests that Lohner was more culpable than he would have us believe. It is true that a defendant's mere presence at the scene of a crime does not establish guilt on an aiding and abetting theory. (*People v. Joiner, supra,* 84 Cal.App.4th at p. 967; *People v. Nguyen, supra,* 21 Cal.App.4th at p. 529; *People v. Hill* (1946) 77 Cal.App.2d 287, 293-294.) The defendant must render aid to a principal in order to be an abettor and must also share the criminal intent of the person who actually committed the offense. (*People v. Hill, supra,* 77 Cal.App.2d at p. 293.) Even if they shared a common unlawful purpose, the person accused of abetting is only guilty if his or her acts were done in furtherance of the criminal scheme. It must be established not only that the accused was present, but that he or she actively aided and encouraged the felons with knowledge of their felonious intent. (*Id.* at pp. 293-294.)

In this matter, there was evidence that Lohner formed an intent to commit robbery before arriving at the Guidi trailer and that he entered the trailer with

Thomas and Kimble in furtherance of that intention. Jessica and Anthony testified that they were frightened right from the start. On the basis of this evidence, the jury could infer that Lohner's presence at the time of entry into the trailer intimidated the children into cooperating with—or at least, not resisting—Thomas and Kimble as they actually committed the robberies. Thus, the jury could properly find that Lohner aided and abetted his cohorts in the commission of their crimes. (See, e.g., *People v. Moore, supra,* 120 Cal.App.2d at p. 306; see also *People v. Phan, supra,* 14 Cal.App.4th at pp. 1463-1464.)

Nonetheless, Lohner argues that when he left the trailer after discovering that its only occupants were two children, he "retreated" from Thomas and Kimble sufficient to end his responsibility for acts that were committed after that time. The law does not support his implied claim that his responsibility ended when his retreat began. Once we conclude that the evidence supports his liability as an aider and abettor, Lohner could only withdraw by notifying his accomplices of his change of heart and doing everything in his power to prevent the commission of the crimes.[21] (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1221, cert. den. *sub nom. Jackson v. California* (1997) 520 U.S. 1216; *People v. Belmontes* (1988) 45 Cal.3d 744, 793, cert. den. *sub nom. Belmontes v. California* (1989) 488 U.S. 1034; see also *People v. Ross* (1979) 92 Cal.App.3d 391, 405; *People v. Norton* (1958) 161 Cal.App.2d 399, 403; CALJIC No. 3.03.) He offers no evidence of notice or any attempt to halt the robberies—he merely stepped out of the trailer, returned to the Bronco to wait for Thomas and Kimble with Luna, and left with his cohorts when they had completed their crimes. This conduct does not demonstrate withdrawal sufficient to counter his liability as an aider and abettor. Thus, the jury properly convicted Lohner of two counts of robbery as an aider and abettor.

We also conclude that the trial court properly denied Lohner's motion for new trial on this ground. A trial court's determination on a motion for new trial rests so

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[21] The jury was properly instructed in this regard.

completely within its discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Turner* (1994) 8 Cal.4th 137, 212, cert. den. *sub nom. Turner v. California* (1995) 514 U.S. 1068, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555 fn. 5; *People v. Duran* (1996) 50 Cal.App.4th 103, 113.) In determining whether there has been a proper exercise of discretion, we judge each case on its own facts. (*People v. Turner, supra,* at p. 212.) As Lohner was liable as an aider and abettor for the acts of his cohorts, his convictions for robbery and burglary were proper. Thus, we find that the trial court did not abuse its discretion when it denied the motion for new trial on the ground he now urges on appeal.

III. JURY INSTRUCTIONS

A. *Unlawful Use of Badge*

1. *Facts*

Thomas and Lohner raise various challenges to the jury instructions given by the trial court. In the first of these challenges, Thomas contends that the trial court failed to instruct on the elements of misdemeanor unlawful use of a police badge on two counts, thus violating his federal and state constitutional rights to due process and jury trial. (See U.S. Const., 5th, 6th & 14th Amends; Cal. Const., art. I, §§ 15, 16; see also § 538d, subd. (b)(2).)

Although the prosecutor had drafted an instruction that Thomas agreed could be given, there is no evidence that the trial court ever instructed the jury on all the elements of the misdemeanor offense of using a false police badge. The jury was instructed that these two counts of unlawful use of a peace officer's badge were charged against Thomas alone on March 11 and March 14. They were instructed that this offense required a union of act and intent. They were told that this offense was a specific intent crime, but the remaining instructions did not set forth the specific intent required for this offense.

2. *Discussion*

A criminal defendant may not be deprived of his or her liberty without due process of law. An impartial jury must determine if he or she is guilty of every element of a criminal offense beyond a reasonable doubt before the defendant may be lawfully convicted. (See U.S. Const., 5th, 6th & 14th Amends.; *United States v. Gaudin* (1995) 515 U.S. 506, 508-510.)

The trial court has a sua sponte duty to instruct on the general principles of law relevant to a case, including instructions on all elements of a charged offense.[22] (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311, cert. den. *sub nom. Cummings v. California* (1994) 511 U.S. 1046; *People v. Magee* (2003) 107 Cal.App.4th 188, 193, cert. den. *sub nom. Magee v. California* (Nov. 10, 2003) ___ U.S. ___ [124 S.Ct. 536].) In this matter, the trial court did not instruct on *any* elements of the offense, except to note that the offense was a specific intent crime. Even on the intent element, the trial court advised the jury that it would be instructed on the specific intent required, but the jury was not so instructed.

The Attorney General concedes—and we agree—that the trial court did not fulfill its obligation to instruct the jury on the elements of the offense of unlawful use of false police badge. Thomas and the Attorney General differ on the standard of prejudice to be applied in this situation—he reasons that the error is reversible per se, while the People urge us to apply a harmless error standard. The Attorney General notes that the prosecutor referred to the elements of this offense in her closing

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[22] "Any person who willfully . . . uses any badge that falsely purports to be authorized for the use of one who by law is given the authority of a peace officer, or which so resembles the authorized badge of a peace officer as would deceive any ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer, for the purpose of fraudulently impersonating a peace officer, or of fraudulently inducing the belief that he or she is a peace officer, is guilty of a misdemeanor . . . ." (§ 538d, subd. (b)(2); see *People v. Poggi* (1988) 45 Cal.3d 306, 327, cert. den. *sub nom. Poggi v. California* (1989) 492 U.S. 938 [language of statute ordinarily satisfied instructional requirement].)

argument[23] as evidence tending to support the application of a harmless error standard, but the Attorney General cites no cases in which the trial court's failure to instruct on the elements of a particular offense was remedied by the argument of either party.[24] The Attorney General also reasons that the error in this matter was more akin to a case of incomplete or ambiguous jury instructions which may prove harmless rather than the complete failure to instruct a jury on the elements of an offense which triggers an automatic reversal. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4; *Boyde v. California* (1990) 494 U.S. 370, 380, affd. (1990) 495 U.S. 924.)

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[23] She explained that the two misdemeanors charges stemmed from the March 11 incident with Meyers and the March 14 incidents with Soto, Espinoza and the Guidi children. She told the jurors that they would be instructed on this offense. Then, she reviewed briefly the elements of the offense. "You have to show the defendant used a badge that falsely purported to be an authorized badge used by police officers; that the badge resembled a badge a peace officer would have as it would deceive any ordinary person looking at that badge, thinking it was a police officer and the defendant used it for the purpose of impersonating a peace officer or fraudulently inducing the belief that he was a peace officer." During deliberations, the jurors asked several questions of the trial court before rendering their verdict. Several of the questions sought guidance on the specific meaning of elements of other offenses and revealed the jurors' careful consideration of these other charges. The jurors also asked to have the testimony of Meyers, Soto and Espinoza reread to them—testimony that included references to Thomas's use of a false police badge. The jurors did not ask for a definition of the offense of unlawful use of a peace officer's badge.

[24] The Attorney General cites *People v. Kelly* (1992) 1 Cal.4th 495, 526, cert. den. *sub nom. Kelly v. California* (1992) 506 U.S. 881, in which a jury was misinstructed on aspect of the law. In that case, the California Supreme Court cited the prosecutor's argument when concluding that the instructional error was not reasonably likely to have misled the jury. The issue in that case was whether the jury was likely to have relied on the mistaken jury instruction, or whether it relied on another factual scenario. Our state high court concluded that the prosecution's argument supported its conclusion that the jury did not rely on the incorrect jury instruction. In Thomas's case, the trial court never gave any jury instructions on the elements of one offense. Thus, we find *Kelly* to be factually distinguishable from the case at bar.

The standard of prejudice appears to be unsettled at this time. Under case law announced before 1999, the California Supreme Court held that when federal constitutional instructional error had been committed, a harmless error analysis could not be used if the error withdrew substantially all of the elements of an offense from jury consideration and other instructions did not require the jurors to find the existence of facts necessary to conclude that the omitted element(s) had been proven. (*People v. Cummings, supra,* 4 Cal.4th at p. 1315; *People v. Clark* (1997) 55 Cal.App.4th 709, 716.) In that case, the failure to instruct a jury on four of five elements of an offense was held to constitute federal constitutional error that was reversible per se. (*People v. Cummings, supra,* 4 Cal.4th at pp. 1312-1315 [robbery].) Reversal was said to be mandated under federal law if instructional error on the elements of a crime necessarily rendered the trial fundamentally unfair, if it aborted the basic trial process or if it denied that process altogether. (*Id.* at p. 1313.)

In 1999, the United States Supreme Court ruled on the standard of prejudice to be applied when federal constitutional instructional error was committed. The omission of a jury instruction on a single element was held to be federal constitutional error, but one that does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence as a complete deprivation of counsel or trial before a biased judge would. If a trial court failed to instruct a jury on an element of an offense, the underlying conviction may be upheld only if the error is harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 4, 9-10, 15; see *Chapman v. California* (1967) 386 U.S. 18, 24.)

The United States Supreme Court classifies constitutional error into two groups: structural error subject to automatic reversal and trial errors subject to a harmless error analysis. Structural errors comprise a very limited class, occurring when a defect affects the framework within which the trial proceeds rather than simply an error in the trial process itself. Examples of structural errors include a complete denial of counsel, bias on the part of the trial court, racial discrimination in

the selection of the grand jury, a denial of self-representation, the denial of a public trial, and use of a defective reasonable doubt instruction. Harmless error analysis has been applied when improper instructions are given on an element of an offense and when instructions on elements of an offense have been omitted. (*People v. Magee, supra,* 107 Cal.App.4th at pp. 193-194; see *People v. Rubio* (2004) 121 Cal.App.4th 927, 934; see also *Neder v. United States, supra,* 527 U.S. at pp. 8-9.)

We have found few California cases on the interplay of the California Supreme Court decision in *Cummings* and the United States Supreme Court decision in *Neder.* The Fifth District has stated in dicta that—in circumstances not present in the case before that court—if a trial court fails to instruct the jury on every element of an offense, it would have committed structural error requiring automatic reversal. (*People v. Magee, supra,* 107 Cal.App.4th at pp. 194-195.) Thus, it is not clear whether the failure to instruct on all elements of an offense is structural error or error that may be harmless beyond a reasonable doubt. (See *Neder v. United States, supra,* 527 U.S. at pp. 8-9.)

We need not decide which standard of prejudice should be applied, because reversal is required under either of them. The error committed by the trial court in failing to instruct the jury on any element of the offense of using a false police badge was federal constitutional error. (See *People v. Cummings, supra,* 4 Cal.4th at pp. 1312-1313.) If this error was structural, then it was reversible per se and Thomas is entitled to have both misdemeanor convictions reversed. (See *id.* at p. 1315; *People v. Clark, supra,* 55 Cal.App.4th at p. 716.) If the error is subject to a harmless error analysis, we apply the standard that applies to federal errors of a constitutional nature, reversing unless the error is harmless beyond a reasonable doubt. (*Neder v. United States, supra,* 527 U.S. at p. 15; see *Chapman v. California, supra,* 386 U.S. at p. 24.) We must ask whether it is clear beyond a reasonable doubt that a rational juror would have found the defendant guilty absent the trial court's failure to instruct the jury on the elements of the offense. (See *Neder v. United States, supra,* 527 U.S. at p. 18.)

On the record before us, we cannot find the error harmless beyond a reasonable doubt. The evidence before the jury was such that no rational person could conclude that Thomas did not actually offer a badge that at least purported to be that of a police officer. A properly instructed jury would have been called on to consider whether the badge used so resembled a police badge that it would deceive an *ordinary reasonable* person. (See § 538d, subd. (b)(2).) In this matter, a rational jury that was properly instructed could have found that despite the actual deception of each of Thomas's victims—all of them, particularly vulnerable—the badge might not have deceived an ordinarily reasonable person. This jury—composed of lay persons rather than attorneys—had no way of knowing that the question of whether the badge would have deceived an ordinarily reasonable person was an issue to be resolved before convicting Thomas of two counts of this charge. As we cannot find that the trial court's failure to instruct the jury on any of the elements of the offense of using a false police badge was harmless beyond a reasonable doubt, we must reverse Thomas's two misdemeanor convictions for this offense. (See *Neder v. United States, supra,* 527 U.S. at pp. 15, 18; see also *Chapman v. California, supra,* 386 U.S. at p. 24.)[25]

B. *CALJIC No. 17.41.1*

Thomas also contends that the trial court's giving of CALJIC No. 17.41.1 was structural error requiring reversal—apparently—of all his convictions.[26] (See U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 15, 16.) In 2002, the

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[25] Thomas also challenges the trial court's failure to give a unanimity jury instruction sua sponte, arguing that in so doing, the trial court violated his constitutional rights to due process and a jury trial. He reasons that this error requires that one of his convictions for unlawful use of a badge be reversed. (See U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 15, 16; see also § 538d, subd. (b)(2).) As we have already concluded that this conviction must be reversed for other reasons, this issue is now moot.

[26] The record does not reveal who requested this jury instruction to be given or if it was given sua sponte.

California Supreme Court upheld CALJIC No. 17.41.1 against federal and state constitutional challenges. (See *People v. Engelman* (2002) 28 Cal.4th 436, 442-445.) Thomas acknowledges as much in his opening brief, but nonetheless urges that we find that this jury instruction violated several constitutional provisions. He makes no attempt to distinguish *Engelman* or to explain why we are not bound to follow its dictates. While the California Supreme Court ordered that this instruction not be given in future cases, the jury instructions were given and the verdicts rendered before *Engelman* was decided on July 18, 2002. (See *People v. Engelman, supra,* 28 Cal.4th 436, 449.) Thus, we find that the trial court committed no error in giving this jury instruction.

C. *Pinpoint Instructions*

In his instructional challenge, Lohner contends the trial court erroneously denied his request for pinpoint jury instructions on aiding and abetting and on fear for purposes of a taking. On this basis, he reasons that all four of his robbery convictions must be reversed. In April 2003, we augmented the record on appeal with the text of these two proposed jury instructions at Lohner's request. At that time, we did not determine the relevance of this evidence, but we now conclude that this evidence is relevant for purposes of this claim of error.

First, Lohner argues that the trial court erred by refusing a jury instruction stating that he could not be found to have aided and abetted crimes committed by others if he merely "stood by" at the time of the offense.[27] He reasons that if the jury had been given this instruction, it would not have convicted him of the four robberies of Soto, Meyers, and the Guidi children or of the assault and attempted grand theft by

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[27] The proposed jury instruction read: "Proof that the defendant only stood by at the time the offense is alleged to have been committed is insufficient to prove the defendant guilty. Unless the prosecution has proven beyond a reasonable doubt that the defendant aided and abetted the crime as defined elsewhere in these instructions, you must find the defendant not guilty. If you have a reasonable doubt whether the defendant aided and abetted the crime, you must resolve that doubt in favor of the defendant and find [him] [her] not guilty."

trick of Espinoza. (See §§ 211, 240, 487, 664.) We have rejected Lohner's related sufficiency of evidence claim of error, finding that he did more than merely be present while others committed crimes that he did not aid or abet. Given his status as an aider and abettor, he was required to signal his intention to withdraw and to act in order to prevent the commission of the crimes in order to insulate himself from further liability for them. (See pt. II.B., C.2., D., E., F.2., G., *ante*.)

In the trial court, Lohner argued that this jury instruction should be given, but the trial court rejected his request because the standard jury instructions it planned to give adequately stated the law in this regard. The trial court instructed the jury that neither a defendant's "[m]ere presence at the scene of a crime which does not itself assist the commission of the crime" nor his "[m]ere knowledge that a crime is being committed and the failure to prevent it" constitutes aiding and abetting. (See CALJIC No. 3.01.) The jury was also told that "an aider and abett[o]r may withdraw from participation" in crimes that he intended to facilitate and "thus avoid responsibility for those crimes" if the defendant notified "the other principals known to him of his intention to withdraw from the commission of those crimes" and did "everything in his power to prevent its commission." (See CALJIC No. 3.03.)

These standard jury instructions correctly stated the law of aiding and abetting. (See pt. II.G., *ante*.) However, Lohner contends on appeal that he was also entitled to have the jury given his pinpoint instruction. A pinpoint instruction relates particular facts to a legal issue in the case, pinpointing the crux of the defendant's case. A trial court may have a duty to give such a pinpoint jury instruction on request in certain circumstances. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117, 1119-1120 [voluntary intoxication case]; see *People v. Wade* (1959) 53 Cal.2d 322, 334, disapproved on another ground in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382, cert. den. *sub nom. Carpenter v. California* (1998) 522 U.S. 1078; see also 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 610, pp. 869-870.) However, a trial court may also properly refuse instructions that duplicate other instructions given. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1134; *People*

v. Sanders (1995) 11 Cal.4th 475, 560, cert. den. *sub nom. Sanders v. California* (1996) 519 U.S. 838; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848.) In this matter, the trial court instructed the jury on what constituted aiding and abetting and on how an aider and abettor could withdraw from liability for committing a crime. (See CALJIC Nos. 3.01, 3.03.) As the substance of the proposed jury instruction was already covered in these standard jury instructions, the trial court properly rejected the proposed pinpoint instruction as cumulative. (*People v. Wright*, *supra*, 45 Cal.3d at p. 1134.)

Lohner also asserts that the trial court erred when it refused to give an instruction on what constitutes a taking accomplished by fear.[28] He notes that there was evidence that Soto and Meyers were not afraid before the actual taking of their property occurred. He reasons that if this jury instruction had been given by the trial court, he might not have been convicted of the Soto and Meyers robberies.[29] (See § 211.) The trial court refused this jury instruction for two reasons—because the language of the proposed instruction was misleading and because the relevant legal concepts were adequately set forth in the standard jury instructions that the trial court intended to give. We have rejected a related claim of error based on similar legal analysis when we found substantial evidence to support these convictions. (See pt. II.B., C.2., D., E., G., *ante*.)

The trial court instructed the jury on force or fear for purposes of robbery. It advised the jury that the taking had to be "accomplished either by force or fear" and that for purposes of aiding and abetting, a robbery continued until the stolen property was carried away to a place of temporary safety. (CALJIC Nos. 9.40, 9.40.1.) These standard jury instructions were legally correct. (See pt. II.B., *ante*.) Again, we find

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[28] The proposed jury instruction read: "A taking is not accomplished 'by fear' unless, as a result of the perpetrator's actions, the victim was in fact afraid and such fear allowed the taking to be accomplished."

[29] Logically, it could also affect the jury's verdict on the robberies of the Guidis.

that the trial court acted within its authority by refusing this jury instruction as cumulative of standard jury instructions given. (See *People v. Wright, supra,* 45 Cal.3d at p. 1134; *People v. Sanders, supra,* 11 Cal.4th at p. 560; *People v. Wooten, supra,* 44 Cal.App.4th at p. 1848; see also CALJIC Nos. 9.40, 9.40.1.) As the substance of the proposed jury instruction was already covered in the standard jury instructions, the trial court properly rejected the pinpoint instruction as cumulative. (*People v. Wright*, *supra*, 45 Cal.3d at p. 1134.)

IV. PROSECUTORIAL MISCONDUCT

A. *Failure to Object*

Lohner contends that all of his convictions should be vacated because the prosecutor committed misconduct during her opening statement and closing argument. Thomas joins in this claim of error. In the trial court, neither Lohner nor Thomas raised any objection to any statement or argument that they now cite as misconduct. On appeal, they concede as much. This is the initial inquiry we must make when a defendant claims that a prosecutor's argument constituted misconduct. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 691.) Generally, a defendant may not complain of prosecutorial misconduct allegedly committed at trial unless he or she made a specific assignment of misconduct in a timely fashion in the trial court and requested that the jury be admonished to disregard any impropriety. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841, cert. den. *sub nom. Samayoa v. California* (1998) 522 U.S. 1125; *People v. Clair* (1992) 2 Cal.4th 629, 662, cert. den. *sub nom. Clair v. California* (1993) 506 U.S. 1063; see *People v. Pitts, supra,* 223 Cal.App.3d at pp. 691-692.) An exception to this general rule may be applied when the harm claimed could not have been cured by admonition. (*People v. Clair, supra,* 2 Cal.4th at p. 662.) However, we are satisfied that if it had been assigned as misconduct in a timely fashion on the grounds asserted on appeal, and if the trial court had found reason to criticize the prosecutor's arguments, an admonition could have cured any error. Thus, Thomas and Lohner waived this issue for our review on appeal. (See, e.g., *id.* at p. 664.)

B. *Ineffective Assistance of Counsel*

Alternatively, Lohner argues that his trial counsel's failure to object to the cited instances of prosecutorial misconduct constituted ineffective assistance of counsel.[30] He asserts that no tactical reason could explain his trial counsel's failure to object. For this reason, he contends that we should address the merits of his prosecutorial misconduct claim, despite proper objections having been made in the trial court. Thomas also joins in this claim of error. (See U.S. Const., 5th & 14th Amends; Cal. Const., art. I, § 15)

A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. To establish a claim of incompetence of counsel, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) To prevail, a defendant must establish incompetence of counsel by a preponderance of evidence. (*People v. Ledesma, supra,* at p. 218.) As an ineffective assistance of counsel claim fails on an insufficient showing of either element, a court need not decide the issue of counsel's alleged deficiencies before deciding if prejudice occurred. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, cert. den. *sub nom. Rodrigues v. California* (1995) 516 U.S. 851.)

Lohner argues that his attorney was ineffective at trial because he failed to object to various alleged instances of prosecutorial misconduct during opening statement and closing argument. In order to prevail on this claim of error, he must demonstrate that prosecutorial misconduct occurred and that an objection would have prompted an instruction curing any error. (See *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375 [defendant must prove he would prevail on underlying constitutional

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[30] Lohner raised an ineffective assistance of counsel claim in his motion for new trial based on grounds other than prosecutorial misconduct.

claim in order to establish that result would have been different in absence of ineffective assistance of counsel].) As the issue of whether trial counsel was ineffective is intertwined with the prosecutorial misconduct allegations that Thomas and Lohner raise on appeal, we consider the merits of these prosecutorial misconduct claims in order to determine the ineffective assistance of counsel claim. (See, e.g., *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1125-1126.)

C. *Law of Misconduct*

The use of deceptive or reprehensible methods to attempt to persuade a jury constitutes prosecutorial misconduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Pitts, supra,* 223 Cal.App.3d at p. 691.) A prosecutor violates a defendant's federal due process rights if he or she engages in a pattern of conduct so egregious that it renders the trial unfair. (*People v. Gionis, supra,* 9 Cal.4th at p. 1214.) Prosecutorial misconduct that does not rise to the level of rendering a trial unfair may nevertheless violate state law. (*Hill, supra,* 17 Cal.4th at p. 819; *People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Espinoza* (1992) 3 Cal.4th 806, 819-820, cert. den. *sub nom. Espinoza v. California* (1994) 512 U.S. 1253.) It is not necessary for the prosecutor to act in bad faith. Even unintentional acts may constitute misconduct. (*Hill, supra,* 17 Cal.4th at pp. 822-823; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36; *People v. Pitts, supra,* 223 Cal.App.3d at p. 691.) The focus of inquiry is on the potential injury to the defendant, not the motive of the prosecution. (*People v. Sanders, supra,* 11 Cal.4th at p. 526.)

A mistrial may be appropriate if the misconduct could not be cured by admonition or instruction. Whether a particular incident is incurably prejudicial and thus merits a mistrial is by nature speculative. (*People v. Hines* (1997) 15 Cal.4th 997, 1038, cert. den. *sub nom. Hines v. California* (1998) 522 U.S. 1077; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) In all but an unusual case, the prejudicial effect of improperly admitted evidence can be cured by admonishment. (*People v. Prather* (1901) 134 Cal. 436, 439; *People v. Allen* (1978) 77 Cal.App.3d 924, 935.) Keeping

in mind the interplay between the claims of prosecutorial misconduct and ineffective assistance of counsel, we consider each specific allegation of misconduct in turn.

D. *Specific Claims of Misconduct*

1. *Opening Statement*

a. *Characterizing Victims and Defendants*

First, Thomas and Lohner argue that the prosecutor's opening statement did not restrict itself to what the evidence would show, but rather made an improper emotional appeal to the jury, promised evidence that she could not produce, and argued the law. They reason that this opening statement biased the jury against them at the outset of their case.

An opening statement's purpose is to inform the jury of the evidence that the prosecution intends to present. It may also properly show how the evidence and all reasonable inferences that may be drawn from that evidence relate to the prosecution's theory of the case. (*People v. Millwee* (1998) 18 Cal.4th 96, 137, cert. den. *sub nom. Millwee v. California* (1999) 525 U.S. 1149.) It prepares jurors to follow the evidence that the prosecution expects to produce and to be able to more readily discern its materiality, force and meaning. As such, it may be presented in a dramatic manner that is calculated to hold the jury's attention without constituting prosecutorial misconduct. (See *People v. Dennis* (1998) 17 Cal.4th 468, 518, cert. den. *sub nom. Dennis v. California* (1998) 525 U.S. 912.) The opening statement is based on evidence that the prosecutor anticipates presenting. (*People v. Boyette* (2002) 29 Cal.4th 381, 446-447.)

In their first of three specific challenges to the prosecutor's opening statement, Thomas and Lohner claim that she emphasized irrelevant matters. The prosecutor began her opening statement by characterizing the case as one of defendants who "[preyed] on the weak" because they sought out victims who were unlikely to report their crimes. She explained that when the jurors heard Meyers testify, they would understand why she described this 18-year-old as "still very much a teenager[,] boy-

type kid." Noting their skill at choosing victims unlikely to report their crimes, the prosecutor characterized the defendants as "sophisticated" criminals.

On appeal, Thomas and Lohner characterize these statements as "prejudicial irrelevancies" that the prosecutor emphasized in order to inflame and prejudice the jury.[31] We do not find the prosecutor's cited statements to be improper. Prosecutors have wide latitude to draw reasonable inferences from the evidence presented at trial. (*Hill, supra,* 17 Cal.4th at p. 823.) He or she may properly identify traits that make a victim particularly vulnerable to attack when these facts bear on the charged offenses and when this evidence is not inadmissible on its face. (*People v. Millwee, supra,* 18 Cal.4th at p. 137.) The prosecution may also refer to a criminal act or a defendant in a shorthand manner during its opening statement, even if that reference is pejorative. (*Id.* at p. 138 [premeditated and deliberate killing described as execution]; see *People v. Davenport* (1995) 11 Cal.4th 1171, 1212-1213, cert. den. *sub nom. Davenport v. California* (1996) 519 U.S. 951, overruled on another ground in *People v. Griffin, supra,* 33 Cal.4th at p. 555 fn. 5 [defendant described as biker].) Applying these authorities and considering the evidence that was later put before the jury, we are satisfied that the prosecutor's opening statement references characterizing Thomas, Lohner and their victims were proper.

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[31] The prosecutor set the scene of the beginning of the Meyers incident at a parking lot of a pizza parlor at a specific location north of Petaluma. She went on to add: "I don't know if you're familiar with this area," explaining that it was in a well-trafficked area. Thomas and Lohner criticize this statement as an invitation to the jurors to draw on their own knowledge of the county to decide the case. However, they cite no case authority supporting their claim that this statement was misconduct. In a civil case, this failure to articulate any pertinent or intelligent legal argument in the opening briefs would lead to a finding that they abandoned this claim of error on appeal. (See *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.) Even if they had cited appropriate authority, we do not view this statement by the prosecutor as anything other than an innocuous attempt to describe the scene of Meyers's initial meeting with Thomas and Lohner so that the jury would understand why Meyers's drug sale and the crimes committed against him occurred at a different location. As such, the prosecutor's comment was not improper.

b. *Citing Unproduced Evidence*

Next, Thomas and Lohner contend that the prosecutor cited evidence in her opening statement that she could not produce. The prosecutor stated that Meyers sold marijuana to "Thomas and Lohner for the same price he bought it for." She set out the facts of the Guidi incident, stating that once the defendants got into the father's bedroom, "they ransacked it, flipped over the mattress and ended up hitting [Jessica]." She led into the facts of the Soto-Espinoza incident by stating that while the foursome was driving away from the Guidi trailer, "Lohner had the idea of [robbing] some Mexicans down where they hang out to go to work." The prosecutor also stated that once Espinoza saw Soto's wallet taken, he wanted to prevent his own from being stolen. At this point, a "fight ensues and [Espinoza was] struggling to keep his wallet."

On appeal, Thomas and Lohner contend that the facts adduced at trial did not support the prosecutor's assertions. We disagree. In our case, there is evidence in the record before us that—if the jury believed it—would warrant at least some of these assertions of fact. For example, Jessica testified that the mattress did, in fact, hit her. The evidence at trial was also capable of an inference suggesting that when he fought with Thomas, Espinoza was, in fact, struggling to prevent the perpetrators from taking his wallet. The prosecution is not limited to the evidence itself, but may also draw any reasonable inference that may be drawn from that evidence if it relates to the prosecution's theory of the case. (See *People v. Millwee, supra,* 18 Cal.4th at p. 137.) In this matter, Jessica's testimony and the reasonable inferences to be drawn from it substantially supported the prosecutor's opening statement review of the evidence. (See, e.g., *People v. Dennis, supra,* 17 Cal.4th at pp. 518-519.)

The statement that Lohner formed the idea to rob Mexican day laborers was supported by evidence adduced at the preliminary hearing. Law enforcement officials testified that Luna and Kimble told them that Lohner had concocted this plan. The prosecutor could reasonably have expected when making her opening statement that this same evidence would be adduced at trial. (See *People v. Boyette,*

supra, 29 Cal.4th at pp. 446-447 [opening statement based on evidence prosecution anticipates offering at trial].) A prosecutor may not use the opening statement as a means of bringing *patently inadmissible* evidence before the jury. (See *People v. Davenport, supra,* 11 Cal.4th at pp. 1212-1213; see, e.g., *People v. Laursen* (1968) 264 Cal.App.2d 932, 937-938, disapproved on another ground in *Mozzetti v. Superior Court* (1971) 4 Cal.3d 699, 703 [prosecutor improperly referred to defendant's status as ex-convict when setting out a witness's expected testimony].) However, in our case, the prosecutor did not attempt to bring inadmissible evidence to the jury—she merely referred to admissible evidence that she expected to be able to present at trial but which was not actually adduced. The fact that this evidence was not actually adduced at trial does not render a prosecutor's reference to it during the opening statement as prosecutorial misconduct. (See, e.g., *People v. Boyette, supra,* 29 Cal.4th at pp. 446-447.)

The statement that Meyers sold marijuana for the same price that he bought it differed slightly from the witness's later testimony that he made about $5 or $10 off the $170 to $175 sale. However, the discrepancy was slight and was not relevant to the charges against Thomas and Lohner. The trial court instructed the jury that none of the statements made by any of the attorneys at trial were evidence. When a claim of prosecutorial misconduct focuses on comments that the prosecutor made to the jury, we must consider whether there is a reasonable likelihood that the jury actually construed or applied any of the complained-of remarks or did so in an improper manner. (See *People v. Samayoa, supra,* 15 Cal.4th at p. 841 [closing argument case].) We find no reasonable likelihood that the minor discrepancy resulted in the jury's improper consideration of the reference made in the prosecutor's opening statement. In such circumstances, minor variances between the evidence cited during the opening statement and that actually presented at trial are not so prejudicial as to warrant reversal. (See, e.g., *People v. Dennis, supra,* 17 Cal.4th at p. 519.) Thus, none of these challenged statements made during the opening statement rise to the level of prosecutorial misconduct.

c. *Personal Belief*

Finally, Thomas and Lohner contend that the prosecutor argued the law and urged conviction in her opening statement. The prosecutor invited the jury to find Meyers to be a believable witness—despite his early lack of candor with police—because "the defendants do it again with the same modus operandi." She then proceeded to set out the facts of the Guidi incident. She ended her opening statement by stating that "I believe at the end of all the evidence, of the testimony, of everything that's going to be introduced that you will find the defendants guilty of all 12 counts beyond a reasonable doubt."

On appeal, Thomas and Lohner assert that these prosecutorial statements constituted improper argument during an opening statement. We disagree. Misconduct may arise if a prosecutor vouches for a witness by placing the prestige of the government behind a witness through personal assurances of his or her veracity. (See *People v. Fierro* (1991) 1 Cal.4th 173, 211, cert. den. *sub nom. Fierro v. California* (1992) 506 U.S. 907 [closing argument case].) In our view, the prosecutor's remarks that Thomas and Lohner challenge in this claim of error did not constitute an improper personal endorsement of a witness. We are satisfied in the context of this case that the prosecutor's first statement sought to offer the jurors a reason to consider Meyers—whom the prosecutor acknowledged had once lied to police—as a credible witness in this matter. During an opening statement, a prosecutor is entitled to explain the evidence that will be adduced at trial, to set out all reasonable inferences that may be drawn from that evidence, and to connect that evidence to his or her theory of the case. (*People v. Millwee, supra,* 18 Cal.4th at p. 137.) In our case, the prosecutor—without committing misconduct—suggested that Meyers's trial testimony might be bolstered by evidence of other offenses allegedly committed by Thomas and Lohner.

Having considered the prosecutor's final comment during her opening statement, we find no misconduct stemming from her statement that she expected that the jury would convict the defendants after all the evidence was brought out at

trial. It is improper for a prosecutor to express a personal belief about a defendant's guilt if the jury is left with the impression that the prosecution is convinced of guilt on the basis information known to the state but not to be presented at trial. (See *People v. Earp* (1999) 20 Cal.4th 826, 864, cert. den. *sub nom. Earp v. California* (2000) 529 U.S. 1005 [closing argument case]; *People v. Roberts* (1992) 2 Cal.4th 271, 310, cert. den. *sub nom. Roberts v. California* (1992) 506 U.S. 964 [closing argument case]; see also *People v. Davenport, supra,* 11 Cal.4th at pp. 1212-1213 [improper to refer to inadmissible evidence in opening statement].) In this matter, the prosecutor specifically referred to the evidence that the jury *would* properly receive when making this statement. Thus, the reference was to the strength of the evidence, not the prosecutor's private belief based on secret knowledge. As such, we are satisfied that the statement made did not leave the jury with an improper suggestion of hidden evidence as a basis for a prosecutor's belief in the defendants' guilt. The prosecutor committed no misconduct during the opening statement.

2. *Closing Argument*

a. *Mere Presence*

Next, Thomas and Lohner argue that the prosecutor's closing argument was also improper. They contend that the prosecutor misstated the law on material points on aiding and abetting and on fear required to establish robbery. They urge us to conclude that she made these misstatements deliberately and at length. They suggest that her misstatements were likely to mislead the jury on controlling legal principles, constituting reversible error.

On the law of aiding and abetting, Lohner contends that the prosecutor persistently argued that because he was physically large, he should be held criminally liable simply because he stood around in the vicinity of a crime. In the closing argument, the prosecutor stated that there was a theme to Lohner's involvement, that being that he was the "muscle in these robberies." Standing at 5'9" or 10", 230 pounds, she reasoned that Lohner offered a "forceful presence" as he stood by. She also argued that Lohner and his cohorts went to the Guidi trailer "with the intent or

purpose to help facilitate the crime and he goes there and by act, promotes, encourages, and instigates the commission of the crime. Now, how does he do that? Well, he shows up and he's standing there . . . at 5'9", 230 pounds. . . . [H]e is robbing because he's standing there . . . ."

On appeal, Lohner argues that the evidence could have led the jury to conclude that he did nothing more than stand by while the others committed the crimes. He argues that the "great weight" of the evidence suggested that all he did was stand by as the crimes occurred at Meyers's car, the Guidi trailer and the Egg Basket market parking lot. Of course, we cannot consider the "great weight" of the evidence that Lohner cites in support of his interpretation of the facts adduced at trial. When substantial evidence supports the jury's findings based on a different view of the evidence, we must construe the evidence in support of that verdict. (See *People v. Bolin, supra,* 18 Cal.4th at p. 331; *People v. Escobar, supra,* 3 Cal.4th at p. 750; *People v. Johnson, supra,* 5 Cal.App.4th at p. 561.) We have already concluded that there was substantial evidence to support the jury's implied finding that Lohner did more than merely stand by while some of these crimes were being committed. (See pt. II.E., G., *ante*.)

Meyers had said that "Lohner just stood by while [Thomas] went through the vehicle and stole items." In essence, Meyers characterized Lohner as "standing by." Lohner and Luna testified that Lohner was not an active participant in the Soto-Espinoza crimes, which he claims on appeal is consistent with his defense that he did no more than stand by while the incident occurred. He argues that Espinoza could not identify the defendants.[32] Lohner notes that he and Kimble were roughly the

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[32] This is not strictly correct. Espinoza was unable to identify who stabbed him and who did not. He was initially unable to identify any of the defendants in court, but he later identified Lohner as one of the perpetrators based on an in-court showup and photographs. He also told the jury that in an earlier photographic lineup, he had identified Lohner as one of the men he encountered at the Egg Basket market. Thus, we find Lohner's claim that Espinoza could not identify him is somewhat misleading.

same height and weight, reasoning that the jury may have had a reasonable doubt about which of these two men was the more active participant and which merely stood by while the crimes occurred.

It is misconduct for a prosecutor to misstate the law during argument. (See *Hill, supra,* 17 Cal.4th at pp. 829-830; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 726-727.) However, Lohner misinterprets the law and the facts that the jury could reasonably deduce from the evidence in his case. One is guilty as an aider and abettor if, with the requisite state of mind, the person in any way—directly or indirectly—aided the actual perpetrator by acts or encouraged the perpetrator by words or gestures. (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 529.) Mere presence does not satisfy this requirement, nor does the failure to take action to prevent a crime from being committed. However, a jury may properly take these factors into account when determining a defendant's criminal responsibility. (*Id.* at pp. 529-530.) The prosecution offered evidence of more than mere presence—it suggested that by intimidating the victims, he intended to and actually did encourage Thomas and deter the victims from resisting. In such circumstances, a jury could lawfully find that Lohner was guilty of these offenses as an aider and abettor. (See, e.g., *People v. Moore, supra,* 120 Cal.App.2d at p. 306; see also *People v. Phan, supra,* 14 Cal.App.4th at pp. 1463-1464.) The evidence that Lohner stood by and allowed crimes to occur was also relevant to the legal question of whether he withdrew as an aider and abettor. (See pt. IV.D.2.b., *post*.) Thus, the prosecutor's argument was based on correct law.

We have already rejected Lohner's related sufficiency of evidence and jury instruction claims of error because they were based on a mistaken interpretation of the law of aiding and abetting. (See pt. II.E., G., III.C., *ante*.) His claim of prosecutorial misconduct based on the prosecution's view of the law of aiding and abetting is likewise deficient, both factually and legally. We are satisfied that the evidence supported more than Lohner's mere presence at the scene of these incidents and that the prosecutor's arguments about his responsibility as an aider and abettor

even if he did not take the most active role in some or all of them was a proper argument based on a correct analysis of the controlling law. Thus, there was no prosecutorial misconduct based on misstatement of the law of aiding and abetting.

b. *Withdrawal*

Lohner also criticizes the prosecutor for repeatedly arguing that he was required to take some action to prevent the crimes in order to avoid criminal liability. He argues that by requiring him to prove that he withdrew, the prosecution improperly shifted the burden of proof to the defense and imposed a legal requirement that had no basis in California law. He reasons that the prosecutor misstated the law during argument, constituting prosecutorial misconduct. (See *Hill, supra,* 17 Cal.4th at pp. 829-830.)

During closing argument, the prosecutor stated that if "Lohner wants to say no, I really didn't do anything, I was just standing there; if he wanted to get out of being an aider and [abettor], he would have to tell [Thomas that] I'm not doing this, man; I'm out of this crime and he must do everything in his power to prevent the crime from occurring." Later, she argued that if, as Lohner testified, he finds that the only occupants of the Guidi trailer are "two kids . . . and I don't want to scare or harm them, I'm not doing this, does he notify the other principals of his intent not to participate in this robbery? No. Does he do everything in his power to prevent it? No. He hangs out in the back of the car. . . . [H]e sees Mr. Thomas bringing [a] pillowcase full of . . . 80 DVDs into the car, carrying it along out there, drops it in, the bong from Anthony Guidi's room gets tossed in the back. Not a peep [from] Mr. Lohner. That makes him a principal." Finally, she told the jury that if Lohner was a principal in these crimes "as either the active participant or the aider and abett[o]r, abandonment is not a defense. [Lohner did not] communicate [to the other perpetrators his] intent to get out of there; [he did nothing] to prevent the crime."

Lohner is incorrect on the law. As we have already concluded, if the jury found that his early intent and acts triggered liability as an aider and abettor, then Lohner was required to take the steps that the prosecutor outlined in order to

withdraw from liability. (See pt. II.G., III.C., *ante*.) By this argument, the prosecutor correctly stated the law and demonstrated how Lohner failed to meet the legal requirements for withdrawal, based on the evidence adduced at trial. There was no prosecutorial misconduct based on misstatement of the law in this argument.

c. *Actual Fear*

Thomas and Lohner also assign the prosecutor's argument about the fear required for robbery as a misstatement of the law. In closing argument, the prosecutor explained the elements of robbery as requiring "not only taking the property, but having the intent that you're going to do it with some force or some fear." She told the jury that it was their job to "look at the facts and decide the intent of the defendants to produce force or fear and if the victims [experienced] force or fear. Either of those."

On appeal, Thomas and Lohner argue that by stating "[e]ither of those," the prosecutor told the jury that a robbery was committed if the defendants intended to frighten their victims or, alternatively if the victims actually experienced fear. If this were an accurate assessment of what the prosecutor said, it would be a misstatement of law, which is improper. (See *Hill, supra,* 17 Cal.4th at pp. 829-830.) However, we are not persuaded that the argument was interpreted by the jurors in the manner that Thomas and Lohner urge us to conclude. When we read the challenged language in context, we are satisfied that the prosecutor argued that the jury had to find either force or fear in order to establish a necessary element of the crime of robbery. The trial court's instructions clearly stated that one of these two alternatives—force or fear—had to be proven in order for the jury to find Thomas or Lohner guilty of robbery. The jury was also instructed on the definition of fear. We are satisfied that the prosecutor did not misstate the law of robbery.

We also disagree with the interpretation of the facts that Thomas and Lohner make when they argue that Soto testified that he was not afraid of them. This view of the facts does not consider *all* the testimony offered at trial. Soto testified that he was not afraid at the point at which Thomas asked to see his identification and he

took out his wallet to show Thomas his identification. However, he also testified that he later became somewhat afraid for Espinoza after the other man was struck—an event that occurred immediately after Soto's wallet was taken. (See pt. II.B., *ante*.) There was also evidence from which a jury could conclude that—despite his bravado—Soto was actually afraid: the size of the perpetrators, the early hour of the day, the isolation of the crime scene, and—most significantly—that Soto fled when Espinoza became involved in a physical fight with the perpetrators.

This claim of error is also flawed because it is based, in large part, on the mistaken assumption that Soto had to have experienced actual fear *before* his wallet was taken from his hand. He argues that the jury could have convicted him of the Soto robbery only if it accepted the prosecutor's invitation to substitute his intent to frighten for Soto's actual fear. This ignores the possibility that the jury found that Soto was actually afraid after his wallet was taken from his hand but before the continuing crime of robbery was completed. As long as Soto was actually afraid before the perpetrators had arrived at a place of temporary safety and had thus completed the robbery, his actual fear could be established for purposes of proving that he was robbed. (See pt. II.B., *ante*.) For all these reasons, we find no prosecutorial misconduct based on misstatement of the law of robbery. (See *Hill, supra,* 17 Cal.4th at pp. 829-830.)

3. *Rebuttal*

Third, Thomas and Lohner contend that the prosecutor committed misconduct during her rebuttal summation by telling the jury that the five victims in this case had "a stake" in the outcome of the case. In her rebuttal argument, the prosecutor stated: "Everybody has a stake in this case. Anthony Guidi does, Jessica Guidi does, Austin Meyers does, Valentin Soto does and Mr. Espinoza does." On appeal, Thomas and Lohner argue that this argument constituted an improper request that the jury look at the evidence through the victims' eyes.

Appeals to the sympathy or passions of the jury are inappropriate during argument in the guilt phase of a trial. (*People v. Pensinger* (1991) 52 Cal.3d 1210,

1250-1251; *People v. Haskett, supra,* 30 Cal.3d at p. 863; *People v. Simington* (1993) 19 Cal.App.4th 1374, 1378.) However, when we view the prosecutor's argument in context, we find that it conveys a different message to the jurors than Thomas and Lohner read into it. The prosecutor's argument was consistent with the principles underlying the cited cases—that the jury should *not* be influenced by such feelings, either for the defendant or for the victims. Immediately before the challenged language, the prosecutor spoke in rebuttal to the defendants' closing argument. She advised the jury that the trial court would instruct them "not to be influenced by pity or prejudice against the defendant, not [to] be biased against the defendant because he's been arrested, but you must not be influenced by sentiment, conjecture, sympathy, passion, public opinion or public opinion." She then reminded the jury that all the victims had a stake in the case, just as the defendants did. "Nobody has a greater stake than anyone else," the prosecutor stated. When viewed in context, we are satisfied that the challenged argument did not constitute an improper appeal to inflame the jury. (See, e.g., *People v. Pensinger, supra,* 52 Cal.3d at p. 1251 [rejecting claim of prosecutorial misconduct based on context of rebuttal argument].) There was no prosecutorial misconduct.

E. *Prejudice*

Thomas and Lohner urge us to consider the prejudice flowing from these specific instances of prosecutorial misconduct as a whole, weighing the cumulative impact that the prosecutor's conduct had on this case. They argue that the jury was encouraged to vindicate the victims rather than determine whether each element of the crimes charged had been proven beyond a reasonable doubt. They criticize the prosecutor for misstating the law of robbery and of aiding and abetting. When all of the errors committed are considered together, Thomas and Lohner reason, the cumulative impact of the various instances of prosecutorial misconduct require reversal of their convictions.

We have found no prosecutorial misconduct among the many cited examples of it that Thomas and Lohner rely upon. As such, there is no prejudice—cumulative

or otherwise—to weigh. Considering their claims of error as claims of ineffective assistance of counsel for failure to object to the challenged prosecutorial statements, we find that a reasonably competent trial counsel would not have objected to these proper arguments and that no prejudice arose as the result of trial counsel's failure to make these objections. Thus, there was no ineffective assistance of counsel. (See *People v. Nguyen, supra,* 40 Cal.App.4th at p. 37 fn. 2; see also *Kimmelman v. Morrison, supra,* 477 U.S. at p. 375; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1126.)

V. JUROR MISCONDUCT

A. *Inquiry Before Trial Court*

Lohner also contends that the trial court mishandled an allegation of juror misconduct and failed to grant him a new trial on this ground. He contends that this error implicated his federal constitutional rights to due process and to a jury trial. (See U.S. Const., 6th & 14th Amends.) Lohner raised this issue in his motion for new trial, but the trial court concluded that it could not have affected him as it only related to a charge pending against Thomas.

On July 17, the jury sent a note to the trial court stating that it was unable to reach a verdict on the charge of assaulting Espinoza with a deadly weapon against Thomas. It indicated that it was hung on this count. One juror had sent a message to the bailiff asking for an opportunity to speak with the judge.

That one juror was brought into the courtroom. He had hoped not to be singled out in this manner, but the trial court—with apologies—indicated that the inquiry had to be conducted in this public manner. The juror stated that he was "really scared" to be called into court to speak in the presence of Thomas, Lohner and the attorneys in the case. He said that he had been instructed to advise the trial court if any inappropriate behavior took place. He then noted that it was difficult to talk about this matter without talking about the charges, but that he would try.

The prosecutor suggested that the proceedings might take place in chambers. The trial court explained that the only people who were present were those who were

required to be there—no spectators, only court people—and that the proceedings had to be recorded. The other jurors were not present. The juror then explained that while the jury was discussing one of the charges, two jurors intimidated him and made him feel that it was not safe for him to express his opinion on the matter. Eventually, he did state his opinion, prompting these two jurors to tell him that "if anything happen[ed] in the future[, it would be his] fault."

The trial court asked the juror if he had changed his verdict because of the conduct of these jurors. He replied that he believed that the two jurors intended for him to change his verdict, but that he had not done so. "I have not changed my position" despite their "badgering," he told the trial court. The trial court allowed the attorney to ask questions of the juror. The prosecutor learned from her questions and the juror's responses that the issue centered on only one count and that the verdict he expected the jury to return would truly reflect his position. "I don't feel real safe" in the jury room, the juror told the court, adding that he felt "it's really important for the Court to know that." The attorneys representing Thomas and Lohner were also invited to ask questions of the juror. Only Lohner's attorney took up the offer. He asked the juror if further deliberation on the disputed count would persuade the juror to change his vote or if that juror felt that they were at an impasse. The juror replied that they were at an impasse on a single count.

At this point, the trial court brought the remaining jurors into court. It conducted an inquiry into the jury's note about the Thomas charge of assaulting Espinoza with a deadly weapon and determined that there was no further guidance it could offer that might help the jury decide this outstanding issue. The jurors agreed that they had completed the remaining verdicts, which were then read into the record. The jurors were unable to reach a verdict and the trial court declared a mistrial on the charge that Thomas assaulted Espinoza with a deadly weapon.

In his motion for new trial, Lohner—acting in pro. per.—argued that he was entitled to a new trial because of this incident. He argued that the two jurors had cornered the reporting juror in a bathroom and discussed the matter with him in

violation of their oath not to discuss the case. He characterized the juror's statement that if anything happened in the future, it would be the fault of the reporting juror as referring to all the crimes charged in this matter. Lohner reasoned that this was proven bias constituting a presumption of prejudice tainting the verdicts. He argued that when the two jurors attempted to pressure a third juror, it affected all the counts. He criticized the trial court for failing to question the jurors to determine who had tried to pressure the reporting juror and who else "may have been opposed" in this matter. He suggested that other jurors may have felt pressured by the two jurors who tried to pressure the reporting juror. He asked for a new trial on grounds of jury misconduct and sought an evidentiary hearing to determine whether the misconduct had affected other jurors.

A hearing was conducted on Lohner's motion for new trial. The prosecutor noted that Lohner's assertions about the juror being confronted in a bathroom were not supported by any evidence. She also argued that the only count that could have been the subject of the jurors' discussion was the assault with a deadly weapon charge against Thomas on which the jury did not reach a verdict. The trial court denied Lohner's motion for new trial on all grounds. On this specific ground for new trial, it reasoned that the jury dispute centered on a count against Thomas and that the juror made it "very clear" that his verdict was not altered by attempts at intimidation.

B. *Waiver*

Preliminarily, we consider the Attorney General's argument that Lohner failed to preserve this issue for our review on appeal because he did not request a more detailed inquiry be made in the trial court. Lohner raised this issue in a motion for new trial and specifically sought an evidentiary hearing to make a further inquiry. This is an appropriate method of raising such a challenge. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1045, cert. den. *sub nom. Jenkins v. California* (2001) 531 U.S. 1155.) As such, we conclude that Lohner preserved this issue for our consideration on appeal.

C. *Sufficiency of Inquiry*

Lohner asserts that the trial court failed to conduct a sufficient inquiry into the issue of jury misconduct. A verdict may be set aside and a new trial granted for jury misconduct. (See Code Civ. Proc., § 657, subd. 2.) When reviewing the denial of a motion for new trial based on allegations of jury misconduct, we examine the entire record and determine independently whether the act of misconduct—if it occurred—prevented the complaining party from having a fair trial. (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 311; see also *English v. Lin* (1994) 26 Cal.App.4th 1358, 1364 [civil case].) The defendant bears the burden of proving juror misconduct. (*People v. Stanley* (1995) 10 Cal.4th 764, 836, cert. den. *sub nom. Stanley v. California* (1996) 517 U.S. 1208.) We independently review the trial court's determination of prejudice if it found jury misconduct, but we defer to the trial court's credibility determinations and findings on issues of fact to the extent that they are supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

This analysis requires us to undertake a three-part inquiry—determining whether the evidence presented for our consideration is admissible, considering whether the admissible evidence reveals facts establishing misconduct, and weighing whether any misconduct was prejudicial. (*People v. Duran*, *supra*, 50 Cal.App.4th at pp. 112-113.) First, we find that we are limited to the evidence offered by the reporting jury at the July 17 hearing. We may not consider the matter that Lohner cited in his motion for new trial, as there is no admissible evidence to support the facts asserted in it.

When we consider only the admissible facts, we conclude that no prejudicial jury misconduct occurred affecting Lohner. The evidence of the July 17 inquiry that the trial court conducted reveals nothing more than a jury room attempt by two jurors to persuade the reporting juror to reach a verdict on the charge that Thomas assaulted Espinoza with a deadly weapon. The reporting juror refused to agree with the other two jurors, the jury was ultimately unable to reach a verdict on this count, and the trial court entered a mistrial on that charge.

The trial court had the discretion to conduct an evidentiary hearing on these allegations but it declined to do so when it denied Lohner's motion for new trial. A defendant is not entitled to such a hearing as a matter of law. Instead, the hearing should only be held when the trial court, in its discretion, concludes that this hearing is necessary to resolve material, disputed issues of fact. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415.) It appears to us that the trial court properly denied Lohner's motion for new trial because it rejected the proffered evidence of juror misconduct as of doubtful credibility and as not establishing a prima facie case for a broader case of juror misconduct. (See *People v. Cox* (1991) 53 Cal.3d 618, 697, cert. den. *sub nom. Cox v. California* (1992) 502 U.S. 1062.)

Two key conclusions persuade us that no prejudice could have resulted from any juror misconduct that arose based on the evidence that is properly before us. First, the reporting juror made it very clear that while he felt that the others were trying to intimidate him into changing his verdict, he did not do so. Second—and perhaps more significantly—the verdict at issue was on a charge against Thomas. Although Lohner urges us to expand the scope of the juror intimidation to extend to other jurors and other counts, we have no admissible evidence before us tending to support this claim. The dispute was not about the charges against Lohner, only against Thomas. As such, Lohner cannot establish any prejudice flowing to him from the unsuccessful attempt at juror intimidation. Thus, the trial court did not err in denying his motion for new trial on the ground of juror misconduct.

VI. CONSECUTIVE TERMS

Finally, Lohner challenges the trial court's imposition of consecutive terms for the Soto robbery and the Espinoza attempted grand theft. (See §§ 211, 487, 654, 664.) The trial court imposed a consecutive term of one year four months for the Soto robbery and a consecutive term of four months for the Espinoza attempted grand theft. It found that the two crimes were separate, committed at a separate place and time, thus justifying the imposition of consecutive terms. On appeal, Lohner contends that this sentencing decision violated the statutory ban on multiple

punishment for multiple acts committed during an indivisible course of conduct. (See § 654.)

An act that is made punishable in different ways by different provisions of the Penal Code may be punished under either provision, but not both. (§ 654, subd. (a); *Neal v. State of California* (1960) 55 Cal.2d 11, 18, cert. den. *sub nom. Neal v. California* (1961) 365 U.S. 823.) The purpose of this provision is to prevent multiple punishment for a single act or omission that violates more than one statute and constitutes more than one crime. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) If all the offenses were incident to one objective, the defendant may be punished for any of these offenses, but not for more than one of them. (*Neal v. State of California, supra,* 55 Cal.2d at pp. 18-19; see *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Violent crimes committed against multiple victims can be separately punished without violating the statutory ban on multiple punishment. (*People v. Latimer, supra,* 5 Cal.4th at p. 1212; *Neal v. State of California, supra,* 55 Cal.2d at pp. 20-21.) Courts have upheld separate sentences for different offenses committed against two victims stemming from the same incident. (See, e.g., *People v. Williams* (1992) 9 Cal.App.4th 1465, 1472-1474 [robbery and grand theft]; *People v. Taylor* (1971) 15 Cal.App.3d 349, 353 [attempted grand theft and assault with deadly weapon].) Applying this standard, we are satisfied that Lohner's robbery of Soto and his attempt to commit grand theft from Espinoza accomplished in part by the use of a knife may be separately punished without violating section 654, even if these two offenses arose during the same incident.

VII. REMITTITUR

Thomas's two misdemeanor convictions for using a false police badge are reversed. In all other respects, the judgments are affirmed.

_____
Reardon, Acting P.J.

We concur:

_____
Sepulveda, J.

_____
Rivera, J.